No. 82-6110

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES DAVID RAULERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE
STATE OF FLORIDA

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QUESTIONS PRESENTED

I. Whether the Petitioner's rights under the Sixth Amendment were violated in that he received ineffective assistance of counsel at the original trial and at the petition for resentencing, due to the manner in which the resentencing was conducted, and further his counsel at the petition for a new trial and the resentencing had a conflict of interest.

II. Whether the Petitioner's fundamental rights to procedural due process and trial by jury were violated in that he was resentenced by a judge without an advisory duty in direct contravention of Fla. Gen. Stat. Ann. Section 921.141 and his Sixth and Eighth Amendment Rights.

III. Whether the Petitioner's rights under the Fifth, Eighth and Fourteenth Amendments were violated in that the death penalty was imposed on a plurality of aggravating circumstances, of which one or more was invalid, and the death sentence should be set aside.

Parties to the proceeding in the Supreme Court of Florida were:

The State of Florida and James David Raulerson.

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In the

SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON,

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STATE OF FLORIDA,

Respondent.

ON APPEAL FROM SUPREME COURT OF FLORIDA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court for the State of Florida entered in this proceeding on August 26, 1982, rehearing denied November 3, 1982.

OPINIONS BELOW

The original opinion of the Florida Supreme Court is reported as Raulerson v. State, 358 So.2d 826 (Fla. 1978) cert. denied 439 U.S. 959 (1978) (Appendix I). The opinion remanding the case to the trial court for a Gardner hearing, on appellant's petition for a writ of habeas corpus, is reported as Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980) (Appendix I). The opinion issued by the Florida Supreme Court reviewing the direct appeal of the sentence of death as well as the order denying appellant's motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850 is reported as Raulerson v. State, 420 So.2d 567 (Fla. 1982) (Appendix I), a timely petition for rehearing was filed and the order denying the petition for rehearing was issued November 3, 1982 (Appendix I). An Order Extending the Time to File a Writ of Certiorari was granted to February 1, 1983 (Appendix I).

JURISDICTION

The judgment of the Florida Supreme Court was entered August 26, 1982 and a timely Motion for Rehearing was filed. An order denying a rehearing was issued November 3, 1982. Raulerson v. State, 420 So.2d 567 (Fla. 1982) (Appendix I). The Petition for Certiorari was filed by February 1, 1983 in according with the Order Extending Time to File Petition for Writ of Certiorari to February 1, 1983, granted by the Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court on December 1, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Gen. Stat. Ann. Section 921.141

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to

authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5).

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES. Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

In August of 1975, the Petitioner, James David Raulerson, was tried in the Circuit Court of Duval County, Florida for the murder of Jacksonville Police Officer, Michael David Stewart.

The jury returned a verdict of guilty and during the penalty phase of the trial the jury recommended, by an 8-4 vote, that the Petitioner be sentenced to death. The trial judge ordered a pre-sentence investigation to aid him in his sentencing determination, and on August 20, 1975, sentenced the Petitioner to death.

Raulerson appealed to the Florida Supreme Court which affirmed his conviction and death sentence. Raulerson v. State 358 So.2d 826 (Fla. 1978) cert. den. 439 U.S. 959 (1978) The only constitutional issues raised in that appeal by Raulerson's counsel were whether the Florida death penalty statute was constitutional, whether it was properly applied, and whether the death penalty itself was constitutional.

On March 23, 1979, the Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida, Jacksonville Division. The District Court granted the Petition and ordered the State of Florida to afford the Petitioner a new sentencing hearing. Raulerson v. Wainwright, 508 F. Supp. 381 (1980) The Federal Court based its decision on the fact that the Petitioner had not received a copy of the pre-sentence investigation, and had never been informed of its contents before he was sentenced to death by the trial judge, in violation of the rule enunciated in Gardner v. Florida, 430 U.S. 349 (1977).

Petitioner's sentencing rehearing was held on August 11, 1980, and he was again, sentenced to death, after filing a motion for a de novo jury sentencing trial, which motion was denied. Petitioner appealed this decision along with an order denying his motion to vacate judgment and sentence

pursuant to Florida Rule of Criminal Procedure 3.950, which motion was filed in the trial court during the pendency of Petitioner's Federal Habeas Corpus proceeding. Petitioner raised 18 issues, including the ineffective assistance of counsel at the original trial as well as the conflict of interest of the Petitioner's counsel at the resentencing hearing and at the petition for new trial. He was denied an evidentiary hearing on the ineffective assistance of counsel at the original trial. His counsel moved to withdraw due to the conflict of interest and was denied permission to withdraw. On appeal as reasons for vacating the judgment and sentence, the Petitioner raised those issues along with other issues. The Florida Supreme Court ruled that none of the issues raised warranted vacation of the appellant's death sentence and affirmed that sentence. Raulerson v. State, 420 So.2d 567 (Fla. 1982)

Petitioner filed a timely petition for rehearing and an order denying said petition for rehearing was rendered on November 3, 1982. The time for the filing of a Petition for Certiorari to This Court was extended to February 1, 1983.

REASONS FOR GRANTING THE WRIT

I. The decision rendered by the Florida Supreme Court is probably not in accord with Powell v. Alabama, 287 U.S. 45 (1932); Herring v. New York, 422 U.S. 853 (1975); Geders v. United States, 425 U.S. 80 (1975); Holloway v. Arkansas, 435 U.S. 475 (1975); Cuyler v. Sullivan, 446 U.S. 335 (1980), in that the Petitioner was denied the effective assistance of counsel and was represented by counsel with a conflict of interest over the Petitioner's and Counsel's objection.

II. A judge sentenced the Petitioner to death without an advisory jury after a prior jury had rendered an 8-4 recommendation for death which does not comport with a death sentence based upon the "conscience of the community" or with "evolving standards of decency". Trop v. Dulles, 356 U.S. 86 (1958), Furman v. Georgia, 408 U.S. 238, 286-91 (1972), Witherspoon v. Illinois, 391 U.S. 510 (1968).

III. The Florida Supreme Court affirmed the imposition of the death penalty on a plurality of aggravating circumstances in a situation in which one or more were erroneously found. Certiorari has been granted in a case entitled No. 81-6908, Barclay v. Florida on November 8, 1982, which case raises similar or identical issues. Barclay v. Florida, November 8, 1982, U.S. , 51 U.S. Law Week 3362 (November 8, 1982)

I. PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT WERE VIOLATED IN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE ORIGINAL TRIAL AND AT THE PETITION FOR RESENTENCING, DUE TO THE MANNER IN WHICH THE RESENTENCING WAS CONDUCTED, AND FURTHER HIS COUNSEL AT THE PETITION FOR A NEW TRIAL AND THE RESENTENCING HEARING HAD A CONFLICT OF INTEREST

In the early forties This Court in dealing with "conflicts of interest" and a criminal accused weighed the benefit of the undivided assistance of counsel of the client's choice, finding that such a desire should be respected. This Court noted that "irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness. ...The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 75-76 (1942). This court has reaffirmed Glasser and held that when a defendant is deprived of the presence and assistance of his attorney in a capital case either throughout the prosecution or during a critical stage, reversal is automatic. See Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978).

Although Glasser and Holloway involved joint representation creating a conflict of interest, the principle is equally applicable in the instant matter. The Petitioner's court appointed attorney, informed the trial judge at the resentencing hearing and at the petition for a new trial of the following:

a) That the State was claiming inter alia, that he failed to raise issues on direct appeal and was to blame for the Petitioner's situation. (See Appendix II)

b) The Petitioner had brought a federal lawsuit against him as his court appointed counsel and had named him as a defendant creating a clear conflict between the Petitioner and his court appointed counsel. (See Appendix III)

The Petitioner's attorney asked to withdraw and the Petitioner asked to have him removed. (See Appendix III) In fact, Petitioner's counsel, Attorney David J. Busch, in the highest traditions of advocacy noted to the trial court that he was not sure who he was defending, i.e., himself or the Petitioner. See Appendix II for a recitation of Attorney Busch's remarks and a refinement of the ethical issues.

In Holloway, This Court has required state courts to investigate timely objections to conflicts arising out of multiple representations. It has also required that defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of a trial. Cuyler v. Sullivan, 446 U.S. 335, 446-48 (1980). The Cuyler decision goes on to require the defendant to bear the burden of showing the conflict, but once the conflict is shown, reaffirms Glasser's holding that he need not be required to show prejudice. In the instant case, the conflict was directly brought to the trial court's attention and the Petitioner's objections were overruled and the Petitioner's counsel's motion to withdraw was denied. The conflict in this case was clear and apparent, and the principles from the joint representation cases are equally applicable. In fact, This Court has held that where a constitutional right to counsel exists, the Sixth Amendment mandates a correlative right to representation that is free from conflicts of interest. Wood v. Georgia, 450 U.S. 261 (1981). The Wood decision evolved from a conflict created by an attorney representing defendants, but who was being paid by a third party, to wit: their employer. Therefore, the holdings of Glasser, supra, Holloway, supra, and Wood, supra, require that the Petition for Certiorari be granted and that the judgment and order of the Florida Supreme Court be reviewed as it appears to be contrary to the aforesaid holdings.

The Petitioner received a one day resentencing hearing after his case was remanded from the United States District Court due to a Gardner[1] violation. However, the Petitioner's counsel was denied his right to have an overnight recess to prepare his final argument, and this arbitrary action by the trial court effectively denied the Petitioner's right to the effective assistance of counsel. (See Appendix IV)

This Court's landmark opinion in Powell v. Alabama, 287 U.S. 45 (1932) recognized the right to counsel in capital cases and further recognized the right to have a meaningful defense. A timetable and a description of the resentencing hearing is found in Appendix IV. The Powell opinion held that the defense appeared to be pro forma rather than zealous and active. The Court went on to find that the defendants "were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." Powell, supra, at 58. Although the Petitioner had counsel, in a hearing as important as a capital resentencing the trial court's denial of an overnight recess to compose and prepare an effective argument on the Petitioner's behalf flies in the face of this Court's mandate of 50 years ago in Powell.

This Court has recognized the importance of final arguments in striking down a New York Statute that made final arguments discretionary in non jury criminal trials. See Herring v. New York, 422 U.S. 853 (1975). In Herring, the Court stated "in a criminal trial, which is in the end basically a fact finding process, no aspect of advocacy could be more important than the opportunity finally to marshal the evidence for each side

[1] Gardner v. Florida, 430 U.S. 349 (1977)

prior to submission of the case judgment "[2] Herring, supra, at 862. The Herring decision concludes that a defendant, before a final determination is made, has a right to be heard through counsel in summation of the evidence from the point of view most favorable to him. Id at 864.

This Court has given great deference to a criminal accused's right to the effective assistance of counsel and has reversed a conviction where the defendant's counsel was judicially barred from conferring with his client during an overnight recess while his client was testifying. Geders v. United States, 425 U.S. 80 (1976), citing Powell v. Alabama, supra, and other right to counsel decisions. Geders concludes that conflicts between competing interests, e.g., convenience, the prosecutor's desire to cross-examine, etc., must be resolved in favor of the right to the assistance and guidance of counsel, citing Brook v. Tennessee, 406 U.S. 605 (1972) Id at 91.

There appears to be an apparent conflict between the decision of the Florida Supreme Court in its approval of the trial court's action and the decisions of This Court in Herring v. New York, supra, Geders v. United States, supra, Brooks v. Tennessee, supra, and Powell v. Alabama, supra.

The Petitioner sought at his Petition for New Trial to establish that he received ineffective assistance of counsel during his original trial. He was denied a hearing, and the defendant's potential witnesses, to wit, experienced criminal defense lawyers were not called to testify on this issue. It

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[2] In overturning the conviction, the Herring decision stated:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068. Id at 862.

is also apparent that there was a substantial issue before the trial court. The Petitioner raised the type of issue considered by This Court in Powell, supra, Brooks, supra, Geders, supra, and yet no hearing was held.[3] The Florida Supreme Court summarily affirmed the denial of the new trial in its summary disposition of the eighteen other issues that were raised. See, Raulerson, supra at 569 and (Appendix V)

The Florida Supreme Court's affirmance of the denial of a hearing on the right to effective assistance of counsel at the original trial appears to be in conflict with This Court's decision in Powell, supra, Brooks, supra, Geders, supra, and Cuyler v. Sullivan, supra. The conflict of the Florida Supreme Court and the decisions of This Court interpreting the Sixth Amendment justifies the granting of Certiorari to review the judgment below.

II PETITIONER'S FUNDAMENTAL RIGHTS TO PROCEDURAL DUE PROCESS AND TRIAL BY JURY WERE VIOLATED IN THAT HE WAS RESENTENCED BY A JUDGE WITHOUT AN ADVISORY JURY IN DIRECT CONTRAVENTION OF FLA. GEN. STAT. ANN. SECTION 921.141 AND HIS SIXTH AND EIGHTH AMENDMENT RIGHTS.*

Florida statute 921.141[4] outlines the procedure for sentencing a defendant who has been convicted of a capital felony. It separates the guilt determination from the sentence determination and it mandates that the penalty determination "proceeding shall be conducted by the trial jury ...." [Emphasis added] The Statute makes provisions for substituting a jury

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[3]The trial court appears to have relied on Cappetta v. Wainwright, 203 So.2d 609 (Fla. 1967) preventing the Petitioner from attacking the competency of retained counsel. Clearly this ruling is directly contrary to This Court's ruling in Cuyler v. Sullivan, 446 U.S. 335, 342-345 (1980).

[4]Fla. Gen. Stat. Ann. Section 921.141.

*A major portion of this argument comes from No. 82-5902, Stevens v. State of Florida, Pet. for Cert. to the Supreme Court of Florida, Patrick M. Wall and Oren Root, Jr., Counselors to the Petitioner, 36 West 44th Street, New York, New York.

other than the trial jury because of "impossibility or inability". Nevertheless it unequivocably makes a jury determination of the appropriate penalty a condition precedent of sentencing a defendant, unless there has been a knowing and voluntary waiver of that right by the defendant.

The Petitioner, James David Raulerson, did not knowingly and voluntarily waive his right to a jury determination of penalty at his resentencing hearing. As indicated in the Statement of The Case, the federal district judge (Castagna), in response to Petitioner's habeas corpus petition, ordered a resentencing hearing. Judge Castagna found that the trial judge had violated the Petitioner's Fourteenth Amendment rights by relying on undisclosed information in the pre-sentence report in violation of Gardner v. Florida, 430 U.S. 349 (1977). In granting the writ of habeas corpus, Judge Castagna ordered the State of Florida to afford the Petitioner a new sentencing hearing without the necessity of an advisory jury. Raulerson v. Wainwright, 508 F. Supp. 381, 385 (1981). In issuing this order, the court made no reference to the procedure dictated by Florida Statute 921.141 or suggested any reason that would excuse shortcutting a procedure dictated by state law.

Judge Castagna's order was that the trial court reconsider the contents of the presentence report "as well as other matters properly considered by the trial court concerning Petitioner's sentence". Raulerson v. Wainwright, supra, 385. These other matters, according to Fla. Gen. Stat. Ann. Section 921.141, include the recommendation of the jury. The statute and the dictates of procedural due process demand that the trial judge cannot pass sentence without first receiving the recommendation of the jury. Any sentence passed without this statutorily mandated jury review, is void because it was arrived at in violation of statutorily prescribed procedures and procedural due process. Moreover, the elimination of the jury from the

resentencing proceedings violates the Sixth and Eighth Amendments to the Constitution of the United States.

It is a fundamental proposition that one convicted of a capital crime by a jury may not constitutionally be sentenced to death for that crime except by a jury, unless a jury sentence is waived. The imposition of the death penalty in this random manner eviscerates the protections of the Sixth Amendment and results in the infliction of cruel and unusual punishment on a capital defendant in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

We recognize that jury sentencing is generally a most uncommon practice in this country,[5] and that at first blush it would, therefore, appear that it is we who have the burden to sustain the constitutional imperative in capital cases of a sentencing procedure so rare. But death cases are different, as This Court has had occasion to note.[6] Where life itself is at stake, it is judicial sentencing which is most uncommon. The "evolving standards of decency" which in part determine meaning of "cruel and unusual punishment"[7] clearly have evolved toward jury sentencing in capital cases.[8]

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[5]See Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 15-16 and n. 59 (1980).

[6]See, e.g., Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, Stewart and Powell, JJ.); Furman v. Georgia, 408 U.S. 238, 286-91 (Brennan, J., concurring), 306-10 (Stewart, J., concurring), 314-71 (Marshall, J., concurring) (1972).

[7]Only eight of the states which have a death penalty statute permit a judge to have the final word on the issue, and one of them does so only when a jury has been unable to agree unanimously on the appropriate sentence.

[8]See, e.g., Trop v. Dulles, 356 U.S. 86, 101 (1958).

[9]Indeed, the preference for jury sentencing in capital cases is seen to be even more clear when it is noted that of the twenty-seven states which require such sentencing, all but one require a life sentence if the jury cannot agree. See Gillers, supra note 5 at 16.

A plurality of This Court stated, in Gregg v. Georgia, 428 U.S. 153, 184 (1976), that capital punishment may be justified when it is the "community's belief" that the crime was "so grievous an affront to humanity that the only adequate response may be the penalty of death".[10] There is no decision of This Court which suggests a contrary view of what may justify a sentence of death. A sentence of death may be constitutionally imposed only when the view of the community as to whether the defendant should forfeit his life for his conduct is reliably brought to bear upon the facts of the crime and the circumstances of the defendant. If that be so, then only a jury, unless one is waived, may constitutionally impose a sentence of death. Since the sentencing decision is predominantly, if not exclusively, a decision about whether retribution is warranted,[11] a jury is far more likely than a judge to make a decision reliably reflecting the conscience of the community.

The jury selection process itself is also designed to see to it that the sworn twelve represent a fair cross-section of the community; there may constitutionally be no systematic exclusion by virtue of race[12] or sex.[13]

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[10] See also the reference to the "conscience of the community" in Chief Justice Burger's dissenting opinion in Furman v. Georgia, supra note 6 at 388.

[11] See Gillers, supra note 5 at 53-54.

[12] See, e.g., Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Jury Comm'n, 396 U.S. 320 (1970).

[13] See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

On the other hand, the overwhelming majority of judges who may be called upon to impose a death sentence are white males with a far better than average income, education and intellect. They hardly effect what could be called a "fair cross-section of the community".[14]

The jury selection process, by means of the voir dire and the exercise of challenges for cause and peremptory challenges, are designed to remove from the final jury those whose views are at either extreme on the issue as to when the death penalty should be imposed. With rare exceptions, neither side in a capital case may cause the disqualification of the judge, even when his views on the death penalty are so extreme as would have disqualified or caused the excusal of any juror who held them.[15]

The very nature of the jury system permits the almost-anonymous juror to vote his conscience on the death penalty without pressure by his or her peers. The clearly-visible judge, on the other hand, who may seek to retain re-election[16] or re-appointment, may find it difficult to withstand pressures on him to favor death over life in a given case or class of cases.

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[14]In Florida's Fourth Judicial Circuit, for example, there were twenty-two Circuit Court judges at the time of Petitioner's trial. See 54 Fla. Bar J. #8 (Sept. 1979), p. 566. Of those twenty-two, only two (9%) were women and only one (4-1/2%) was black. Women comprised 52% and blacks 22% of the total population of the Circuit in 1980. See United States Bureau of Census, 1980 Census of Population and Housing. General Population Characteristics for Florida, Table 45. The same disparity exists in Florida as a whole. There are some 339 Circuit Court judges of whom eighteen (5.4%) are women and eight (2.4%) are black. Women comprise 52% and blacks 14% of the entire population. See Ibid, Table 18.

[15]Anthony Lewis has reported that shortly after this Court's rejection in Furman v. Georgia, supra note 6, of the nation's death penalty statutes as they then existed, a Florida judge demonstrated his view of the case by publicly throwing a hangman's noose over the limb of an oak tree in front of his courthouse. Lewis, "Cruel and Unusual," The New York Times, October 21, 1982, p. A31, c. 1-2. That such a "hanging judge" might override the community's view, as expressed by a jury's advisory life sentence, and order a defendant to be executed, is constitutionally intolerable and does not even give the appearance of justice.

[16]Florida Circuit Court judges are elected for six-year terms.

In the Petitioner's case, which involved the death of a police officer, the jury recommended the death penalty by a 8-4 vote, which was not a clear mandate for the death penalty and does not reflect the conscience of the community.

Empirical studies have shown that when judges and jurors disagree on whether a defendant convicted of a capital crime should live or die, the judge is far more likely to opt for death than the jury.[17] In Witherspoon v. Illinois, 391 U.S. 510 (1968), This Court held unconstitutional a jury selection system which made it far more likely that the jury, which had the final word on life or death, would vote in favor of the ultimate punishment rather than extend mercy. We submit that, although different considerations are involved in the two issues, the principles involved in Witherspoon and this case are basically the same. This Court having struck down a system which weighted the odds against a defendant at the very start of a capital trial should do the same with a procedure with a similar effect at the very end of the trial.

We respectfully submit, therefore, that This Court should grant Certiorari because the resentencing was done in violation of the dictates of Fla. Gen. Stat. Ann. Section 921.141, as the defendant did not knowingly or voluntarily waive his right to a jury determination of his penalty. This failure to have a jury determine the sentence violates the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States and the Florida Supreme Court refused to consider this issue in its decision.

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[17]The Florida statistics, as set forth in Gillers, supra note 5 at 67-68 and n.318, illustrate the point with particular relevance. Moreover, we have been advised by those in Florida who have followed such cases closely that, since the enactment of the statute Petitioner now challenges, some seventy-two jury recommendations of life imprisonment have been overridden by the trial judiciary, which has reduced jury death recommendations on only approximately fifteen occasions. Those figures are striking. We submit that with such great judge-jury disparity on what the conscience of the community has to say about the fate of one convicted of a capital crime, it is almost certainly the judges, not the jurors, who have misread the will of the community.

III. THE FLORIDA DEATH PENALTY SENTENCING PROCEDURE WAS APPLIED TO PETITIONER IN AN ARBITRARY AND CAPRICIOUS MANNER WHICH VIOLATED PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS IN THAT THE FLORIDA SUPREME COURT CONSIDERED ERRONEOUS AGGRAVATING CIRCUMSTANCES.

A. The Florida Supreme Court Failed To Follow The Mandate And Safeguards In Proffitt And Furman.

In Proffitt v. Florida, 428 U.S. 242 (1976), This Court examined the Florida death penalty sentencing procedures as set forth in Fla. Gen. Stat. Ann. Section 921.141 (Supp. 1976-1977) and found the statute to meet the constitutional requirements that the death penalty would not be imposed in an arbitrary or capricious manner. This Court placed great reliance on Florida's procedure of appellate review by the Florida Supreme Court to minimize the risk of arbitrary and capricious death sentencings. Although This Court found the death penalty sentencing procedure constitutionally valid, that procedure has been applied in an arbitrary and capricious manner in the Petitioner's case in violation of his Fourteenth Amendment Due Process Rights and his Eighth Amendment Rights.

Fla. Gen. Stat. Ann. Sec. 921.141 and Florida decisions law provide that the sentencing judge may consider only those statutory aggravating circumstances which are applicable to an accused, which procedure was not done in this case.

In its sentencing order, the trial court found that the Petitioner "knowingly created a great risk of death to many persons". See Section 921.141 (5)(c) (Appendix I). The trial court concluded that Petitioner, by use of a firearm, by his directions to the people in the restaurant, and by all of his actions created a great risk of death to many persons. (Appendix I). Thus, the Florida Supreme Court affirmed the trial court and held

> There were four non-participating, unarmed and innocent people present in the restaurant during the shoot-out between appellant and police. That they took refuge on the floor behind tables and counters certainly does not mean that they were in no risk of being killed. A gun battle in a confined area certainly created a "likelihood" or "high probability" that someone, bystanders or police officers would be hit and killed. Raulerson v. State, 420 So.2d at 571 (Appendix I)

This finding conflicts with other cases where the Florida Supreme Court has reviewed the applicability of the aggravating circumstance that defendant "knowingly created a great risk of death to many persons."

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), the Florida Supreme Court, on facts similar to the present case, held that the trial court erred in finding that defendant had created a great risk of death to many persons. The fact that defendant fired five shots at the victim while two other employees were near in a bakery and other employees were in the building adjacent to a heavily traveled intersection was insufficient to support such a finding. The Florida Supreme Court held:

> When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many", the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance. We hold that the trial court erred in finding that the appellant created a great risk of death to many persons.

Id. at 1009-10 (emphasis added)

See also, Lewis v. State, 377 So.2d 640 (Fla. 1979).

The record, in the present case, simply does not support either the trial court's finding or the Florida Supreme Court's affirmance that a "likelihood or high probability" of "a great

risk of death was created by petitioner's action to 'many persons'". See also Jacobs v. White, 396 So.2d 713 (Fla. 1981), White v. State, 403 So.2d 331 (Fla. 1981); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1980).

The trial court also found that petitioner's crime was "especially heinous, atrocious, or cruel manifesting exceptional depravity" See Section 921.141(5)(h). The Florida Supreme Court found the trial court erred in this determination, Raulerson v. State, 420 So 2d at 571 (Appendix I), but nevertheless it did not remand the case to the trial court for reconsideration of the sentence, instead it permitted the death sentence to stand.

Although in Proffitt v. Florida, supra, This Court found the Florida capital sentencing procedure to meet the constitutional test, in Petitioner's case, the Florida Court has failed in its duty to review and reweigh the aggravating circumstances to determine independently whether a sentence of death is warranted. A careful reading of the Florida Supreme Court's opinion makes it apparent that there was no meaningful review.

Where discretion is afforded to [illegible] a sentencing body on the state's ultimate court of review on a matter so grave as the determination whether a man lives or dies, that discretion must be suitably directed and limited so as to minimize the risk of a wholly arbitrary and capricious action. Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 187 (1976). One can perhaps understand the trial court's misapplication of two aggravating circumstances in this case in its zeal to give Petitioner the death penalty after a rushed one-day hearing. However, one cannot excuse the Florida Supreme Court for its failure to "suitably direct and limit the discretion" of the trial court or of itself. The Florida Supreme Court has engaged in that "cursory or rubber stamp review" that This Court in Proffitt trusted would not occur by its failure "to determine

independently whether the imposition of the ultimate penalty is warranted". Proffitt, supra, at 253.

The Florida courts, in the application of the Florida capital sentencing procedure in this case, has exhibited a blatant disregard for the standards devised to regulate the imposition of the death penalty and has called into question the very basis for this court's approval of that procedure in Proffitt.

B. Where A Death Penalty Is Imposed On A Plurality Of Aggravating Circumstances, Of Which One Or More Are Invalid, The Sentence Of Death Must Be Set Aside.

This case presents a clear and direct conflict between the Florida Supreme Court on the one hand and the Eleventh Circuit Court of Appeals and This Court on the other.

This Court has recently recognized this conflict by granting Certiorari in Barclay v. Florida, November 8, 1982, ____ U.S. ____, 51 U.S. Law Week 3362 (November 8, 1982). In Barclay, Certiorari was granted after the Florida Supreme Court affirmed the imposition of a sentence of death based on the trial court's erroneous consideration and application of both non-statutory and/or unconstitutional statutory aggravating circumstances. Petitioner's case raises similar or identical issues for review by This Court.

The Eleventh Circuit Court of Appeals in Proffitt v. Wainwright, No. 80-5977, ____ F.2d ____ (11th Cir. 1982) disallowed the application of an unconstitutional statutory aggravating circumstance or the consideration of non-statutory aggravating circumstances. That Court held that consideration and application of such aggravating circumstances was erroneous and entitled that petitioner to a new sentencing hearing.

In contrast to the Eleventh Circuit Court's decision in Proffitt v. Wainwright, supra, and the issues raised in Barclay, supra, are the decisions of Florida Supreme Court.

It is well settled in Florida that a death sentence will be affirmed so long as the evidence supports a finding of at least one aggravating circumstance, even though the sentence of death was predicated in part on improperly found statutory or non-statutory aggravating circumstances. Raulerson v. State, 420 So.2d at 571-572 (Appendix I). Elledge v. State, 346 So.2d 998, (Fla. 1977). Hargrave v. State, 366 So.2d 1, (Fla. 1979). Demps v. State, 359 So.2d 501 (1981). Armstrong v. State, 399 So.2d 953, (Fla. 1981). Sireci v. State, 399 So.2d 964 (Fla. 1981). Tafero v. State, 403 So.2d 355 (Fla. 1981). Francois v. State, 407 So.2d 885 (Fla. 1982).

This Florida Rule is based on a footnote set out by This Court in Proffitt v. Florida, supra.[18] The Florida Supreme Court relies on that footnote as justification for a sentence of death which is partially based upon the erroneous consideration or application of either non-statutory or statutory aggravating circumstances.

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating circumstances where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. Elledge v. State, 346 So.2d at 1002-03 (Fla. 1977), Demps v. 395 So.2d 506 (Fla. 1981).

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[18] In one case, the Florida Court upheld a death sentence where the trial court had simply listed six aggravating factors as justification for the sentence he imposed. Sawyer v. State, 313 So.2d 680 (1975). Since there were no mitigating factors, and since some of those aggravating factors arguably fell within the statutory categories it is unclear whether the Florida Court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so since the capital sentencing statute explicitly provides that (a) aggravating circumstances shall be limited to the following (eight specified factors), section 921.141(5) (Supp. 1976-1977). (Emphasis added). There is no such limiting language introducing the list of statutory mitigating factors. Proffitt v. Florida, 428 U.S. 242, 250 n.8 (1976).

Petitioner has demonstrated that the trial court erroneously found two statutory aggravating circumstances to exist:

(a) Petitioner created a great risk of death to many persons.

(b) Petitioner's crime was especially heinous, atrocious, or cruel.

The erroneous application of these aggravating circumstances permitted arbitrary and discretionary influences into the sentencing in violation of Petioner's Fourteenth and Eighth Amendment Rights.

Certain principles affirmed by This Court establish the violation of Petitioner's constitutional rights. An unbroken line of cases since Furman v. Georgia, 408 U.S. 238 (1972), requires any state wishing to impose a capital sentence to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. Godfrey v. Georgia, ___ U.S. 420 (1980). Special capital sentencing requirements derive from the Court's recognition that there is a significant constitutional difference between the infliction of the death penalty and lesser punishments. Beck v. Alabama, 447 U.S. 325 (1980). This qualitative difference calls for a greater degree of reliability when the sentence of death is imposed. Lockett v. Ohio, 437 U.S. 586 (1978).

The consideration by the trial judge in this case of two invalid statutory circumstances violated each of these procedural requirements. The erroneous consideration by the trial judge here is identical with the consideration by the jury in Zant v. Stephens, ___ U.S. 72 L.Ed 2d 222 (1982) of an unconstitutional aggravating circumstance. The Fifth Circuit Court of Appeals found that because of the consideration

by the Stephens jury of the unconstitutional aggravating circumstance, it could not be determined with the degree of certainty required in capital cases that the evidence of those convictions together with the instructions did not make a critical difference in the jury's decision to impose death. Stephens v. Zant, 631 F 2d 397 (5th Cir. 1980). The same considerations particularly apply to the death sentence imposed on Petitioner because Petitioner was sentenced to death after a jury erroneously considered one or more aggravating circumstances in its deliberation. (See Argument II, infra)

In Proffitt v. Florida, supra, This Court found

> The Florida capital - sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary and capricious manner. Moreover to the extent that any risk to the contrary exists it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted" . . . Proffitt v. State, supra, at 352-53. (Emphasis added)

As can be seen by the sentencing order and the Florida Supreme Court's opinion in this case, This Court's confidence in the Florida capital sentencing procedure was misplaced. The adoption of the rule of Elledge v. State, supra, has introduced arbitrariness and capriciousness into the Florida death - sentencing procedure. Unlike the situation in Zant v. Stephens, supra, This Court does not have to question whether the Florida Supreme Court will sustain a death penalty as long as one of a plurality of aggravating circumstances found by a judge is valid and supported by the evidence.

CONCLUSION

For the reasons hereinbefore set forth, the Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of Florida. Thirty-eight states presently have the death penalty and at the present time the death row population of the United States is presently at 1,137. The Florida death row population consists of 189 death row prisoners presently facing execution. "An Eye for an Eye", Time Magazine, January 24, 1983, p. 28. Thus, it would appear to be more than appropriate for This Court to consider the issues raised in the Petitioner's Writ of Certiorari.[19]

Dated: Torrington, CT.
January 27, 1983

Respectfully submitted,

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[19]Out of 50 states, 38 states presently have the death penalty. Florida has approximately 16% of all persons sentenced to death in the United States. If one takes the 38 death penalty states, in light of the 1,137 sentenced inmates, each state statistically would have approximately 30 death row inmates. Florida has 189.

CERTIFICATION OF SERVICE

I hereby certify that I have placed in the United States Mail, postage prepaid, two (2) copies of the Motion for Leave to Proceed In Forma Pauperis and the Petition for a Writ of Certiorari to the Supreme Court for the State of Florida, and the Appendix thereto, to counsel for the Respondent State of Florida:

Jim Smith, Attorney General
and
Carolyn M. Snurkowski, Assistant
Attorney General
The Capitol
Suite 1502
Tallahassee, FL 32301

on January 27, 1983.

Joseph F. Keefe

82-6110

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES DAVID RAULERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, JAMES DAVID RAULERSON, moves the court for an order permitting him to proceed in This Court, in forma pauperis, with his appeal from the judgment of the Supreme Court of the State of Florida entered in this cause on August 26, 1982, rehearing denied on November 3, 1982, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of This Court, and in support thereof attaches the affidavit of said Petitioner.

Petitioner's jurisdictional statement is being filed with this motion and Petitioner's affidavit.

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JURISDICTIONAL STATEMENT

The judgment of the Florida Supreme Court was entered August 26, 1982 and a timely Motion for Rehearing was filed. An order denying a rehearing was issued November 3, 1982. Raulerson v. State, 420 So.2d 567 (Fla. 1982). The Petition for Certiorari was filed by February 1, 1983 in accordance with the Order Extending Time to File Petition for Writ of Certiorari to February 1, 1983, granted by the Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court on December 1, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON,	:	
	:	
Petitioner,	:	
	:	
v.	:	Case No.
	:	
STATE OF FLORIDA,	:	
	:	
Respondent.	:	
	:	

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED ON CERTIORARI IN FORMA PAUPERIS

I, JAMES DAVID RAULERSON, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees, and to proceed in forma pauperis:

1. I am the petitioner in the above captioned action.

2. Because of my poverty I am unable to pay the costs of said cause: I own no real or personal property: I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without renumeration.

5. I believe that I am entittled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Circuit Court of Duval County for the 4th Judicial District of the State of Florida of Murder in the First Degree, and a sentence of death was imposed by the trial court on August 20, 1975. I am being held at the Florida State Prison in Starke, Florida. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

I understand that a false statement or answer to any questions in the affidavit will subject me to penalties for perjury.

JAMES DAVID RAULERSON

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of James David Raulerson was subscribed and sworn to before me on this _____ day of January, 1983.

Notary Public

My commission expires _____

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES DAVID RAULERSON,

Petitioner

v.

STATE OF FLORIDA,

Respondent

APPENDIX

APPENDIX I

OPINIONS BELOW

1. Raulerson v. State, 420 So.2d 567 (Fla. 1982)

2. Raulerson v. Florida
Order Extending Time to File Petition for Writ of Certiorari, December 1, 1982

3. Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980)

4. Raulerson v. State, 358 So.2d 826 (Fla. 1978)

James David RAULERSON, Appellant,

v.

STATE of Florida, Appellee.

Nos. 59680, 59757.

Supreme Court of Florida.

Aug. 26, 1982.

Rehearing Denied Nov. 3, 1982.

Sentence of death and order denying motion to vacate judgment and sentence, issued by Circuit Court in and for Duval County, Ralph W. Nimmons, Jr., J., were appealed by defendant found guilty of first-degree murder. The Supreme Court, Adkins, J., held that: (1) trial court's failure to attach copy of entire record in its order denying motion to vacate judgment and sentence was not harmful error; (2) trial court properly denied defense counsel's motion to withdraw; (3) defendant's actions created great risk of death to many persons within meaning of statute governing aggravating circumstances; (4) aggravating circumstance that murder was committed after commission of rape was not inapplicable on ground that crime of rape was repealed prior to defendant's action; (5) application of aggravating circumstance relating to capital felonies committed for pecuniary gain was permissible; (6) error in finding that killing was heinous, atrocious and cruel was harmless; (7) trial court did not abuse its discretion in denying defendant's motion for continuation of sentencing; (8) defendant was not denied due process and effective assistance of counsel by sentencing court's refusal to allow his attorneys nights rest before presentation of closing argument; and (9) defendant failed to show that State possessed some specific information favorable to defendant required to be disclosed.

Affirmed.

1. Criminal Law ⇐998(3)

Where postconviction petitioner failed to raise at trial or direct appeal issue of trial court's alleged error in improperly instructing jury as to underlying felonies in his prosecution for felony-murder, issues were waived for purposes of appeal from order denying motion to vacate judgment and sentence. West's F.S.A. Rules Crim. Proc., Rule 3.850.

2. Criminal Law ⇐998(3, 13)

Motion to vacate judgment and sentence cannot be used as substitute for appeal, and where matters raised therein could have been or were raised on direct appeal, denial of motion is proper. West's F.S.A. Rules Crim.Proc., Rule 3.850.

3. Criminal Law ⇐1177

Where only way Supreme Court would be able to determine whether postconviction relief petitioner was erroneously denied evidentiary hearing on his claim of ineffective assistance of counsel would be to review whole record, trial court's failure to attach to its order denying petitioner's motion to vacate judgment and sentence that portion of record which showed reason why petitioner was not entitled to evidentiary hearing was not harmful error. West's F.S.A. Rules of Crim.Proc., Rule 3.850; West's F.S.A. Const. Art. 5, § 3(b)(1); U.S.C.A. Const.Amends. 6, 14.

4. Criminal Law ⇐998(20)

While State was critical of motives behind defense counsel's timing in raising motion for postconviction relief, where criticism did not create any conflict of interest between defendant and his counsel, trial court properly denied motion to withdraw made by defendant's counsel. West's F.S.A. Rules Crim.Proc., Rule 3.850.

5. Criminal Law ⇐1208(1)

Where there were four nonparticipating, unarmed and innocent people present in restaurant during shoot-out between defendant and police, statutory aggravating circumstance that defendant's actions created great risk of death to many persons was satisfied. West's F.S.A. § 921.141(5)(c).

6. Criminal Law ⇐1208(1)

Aggravating circumstance that murder was committed after commission of rape was not inapplicable to defendant on ground that crime of "rape" was repealed prior to defendant's offense and, therefore, no such offense existed at time of killing. West's F.S.A. § 921.141(5)(d).

7. Criminal Law ⇐1208(1)

Where there was no finding that killing was committed during robbery, which would be aggravating circumstance by itself, application of aggravating circumstance relating to capital felonies committed for pecuniary gain was permissible, and not improper doubling of aggravating circumstances. West's F.S.A. § 921.141(5)(d, f).

8. Criminal Law ⇐1177

Although killing for which defendant was responsible was not heinous, atrocious and cruel within meaning of statute governing aggravating circumstances to be considered in imposing sentence of death, where there was no finding of mitigating circumstances, error of trial court in finding killing to be heinous, atrocious and cruel was harmless. West's F.S.A. § 921.141(5)(h).

9. Criminal Law ⇐1177

Where judge did consider effect of defendant's stepfather's murder on defendant, judge's finding in imposing death sentence upon defendant that there was no evidence of extreme mental and emotional disturbance at time of crime would not be reversed on ground that judge denied defendant's request to appoint experts to examine defendant with respect to similarities between circumstances of defendant's crime and those of murder of his stepfather.

10. Constitutional Law ⇐250.3(1), 270(1)
Criminal Law ⇐641.12(1)

Where federal court's initial habeas corpus order was issued over three months before date on which defendant was sentenced, and defendant could have begun preparing for resentencing at that time, trial court's denial of defendant's motion for continuance of sentencing was not denial of rights of due process, equal protection, and effective assistance of counsel on grounds that only six weeks separated federal court's denial of rehearing on habeas corpus order and resentencing. U.S.C.A. Const.Amends. 6, 14.

11. Constitutional Law ⇐270(1)
Criminal Law ⇐641.12(1)

Where trial court did not refuse counsel opportunity to present closing argument, but merely refused to delay presentation of closing argument until next morning, and defendant's attorneys could have given closing arguments had they been willing to do so in the evening, defendant was not denied due process and effective assistance of counsel by sentencing court's refusal to allow his attorneys a night's rest before presentation of closing argument. U.S.C.A. Const.Amends. 6, 14.

12. Criminal Law ⇐986.1

Where day of defendant's sentencing did not appear to have been unreasonably long or strenuous, hearing did not begin until 10:00 a.m., two-hour lunch break was taken by all, and trial judge offered dinner break to defendant's counsel prior to giving summation but counsel refused break as inadequate, trial court did not abuse its discretion by refusing continuance until next morning for presentation of closing argument.

13. Constitutional Law ⇐268(5)

Rule that suppression by prosecution of evidence favorable to accused upon request violates due process where evidence is material either to guilt or to punishment is applicable at sentencing phase of trial as well as guilt determination phase. U.S.C.A. Const.Amend. 14.

14. Constitutional Law ⇐268(5)

Demand for exculpatory evidence seeking to discover any possible mitigating information known to State, made during sentencing hearing, was insufficient to trigger principle that suppression by prosecution of evidence favorable to accused upon request violates due process where evidence

is material either to guilt or to punishment. U.S.C.A. Const.Amend. 14.

15. Criminal Law ⇐986.1

Where defendant's request for exculpatory evidence was not specific, prosecutor adequately responded to general exculpatory information inquiry by stating that he was not aware of any such evidence, and defendant failed to show that State did possess some specific information, sentencing hearing was not improper on ground that prosecution's casual dismissal of defendant's request without any review of his files violated principles governing suppression of favorable evidence by prosecutor.

David J. Busch, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Carolyn M. Snurkowski, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

We have for review an order denying a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850, as well as a direct appeal of a sentence of death. Appellant, James David Raulerson, was found guilty of first-degree murder and sentenced to death. This Court affirmed the trial court's judgment and sentence. *See Raulerson v. State*, 358 So.2d 826, *cert. denied*, 439 U.S. 959, 99 S.Ct. 364, 58 L.Ed.2d 352 (1978). Following our affirmance, appellant filed a petition for writ of habeas corpus in the United States District Court, Middle District, which presented a single *Gardner* (*Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)), issue for that Court's determination. While awaiting the federal district court's decision, appellant, pursuant to Florida Rule of Criminal Procedure 3.850, filed, in the trial court, a motion to vacate judgment and sentence alleging several constitutional infirmities in the guilt and sentencing phases of the trial.

Before determination of the motion for post-conviction relief, which was subsequently denied by the trial court on May 9, 1980, the federal district court granted appellant's habeas corpus petition and directed that a new sentencing hearing be held within sixty days. The sentencing hearing was originally set by the trial court for July 15, 1980, but at a status conference held on July 15, 1980, that date was rescheduled for July 21, 1980. On July 16, 1980, the federal district court relaxed the sixty-day time constraint that it had placed on the new sentencing hearing, and on July 21, 1980, the lower court once again continued the sentencing proceeding, which was finally held on August 11, 1980. On August 12, 1980, appellant was again sentenced to death by the lower court. Appellant then filed a notice of appeal to this Court in case nos. 59,680 and 59,757 in which he sought review of the trial court's denial of his motion for post-conviction relief and his sentence of death. These cases have been consolidated by this Court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant raises eighteen issues in support of his assertion that the court below erred in denying his motion for post-conviction relief. We have reviewed these issues and find that appellant's motion fails to raise any grounds which require reversal of the trial court's denial.

[1, 2] Concerning appellant's argument that he should have been granted post-conviction relief because the trial court improperly instructed the jury as to the underlying felonies in his trial for felony-murder, the Court finds that this issue could have been raised at trial or on direct appeal, and that failure to do so constitutes a waiver for purposes of appellant's 3.850 motion. A motion to vacate judgment and sentence cannot be used as a substitute for an appeal, and where matters raised therein could have been or were raised on direct appeal, denial of the motion is proper. *See Meeks v. State*, 382 So.2d 673 (Fla.1980).

In regard to appellant's assertion that the trial court erred in not allowing his counsel to withdraw, this Court finds no basis for reversing the trial court's denial.

Appellant also contends that the trial court erred in denying his request for an evidentiary hearing to determine whether he was denied effective assistance of counsel. At the time that the trial court ruled on appellant's motion for postconviction relief, the rule of law in Florida was that claims of denial of effective assistance of counsel based on inadequacy or incompetence of retained counsel were not cognizable as grounds for challenging conviction on appeal or collaterally in a motion for post-conviction relief under Rule 3.850. *Cappetta v. Wainwright*, 203 So.2d 609 (Fla.1967). Based on this authority, the trial court concluded that appellant's motion for post-conviction relief failed to raise grounds "properly cognizable in a post-conviction proceeding under and pursuant to Rule 3.850, Fla. R.Crim.P." Notwithstanding this finding, the trial court went on to review the transcript of appellant's trial and concluded that it conclusively shows that counsel for appellant met the standard of effectiveness of counsel as recently adopted by the Florida Supreme Court in *Meeks v. State*, 382 So.2d 673 (Fla.1980).

On May 7, 1980, almost one year after the trial court had ruled on appellant's motion for post-conviction relief, this Court rendered its decision in *Vagner v. Wainwright*, 398 So.2d 448 (Fla.1981), which overruled *Cappetta* and held that claims of denial of effective assistance of counsel based on inadequacy or incompetence of retained counsel are cognizable in state courts as grounds for challenging convictions on appeal or collaterally in a Rule 3.850 motion.

Based on this Court's decisions in *Vagner* and *Meeks*, appellant now argues that the dismissal of his Rule 3.850 motion by the court below was erroneous, and that an evidentiary hearing on his claim that he was denied effective assistance of counsel should have been granted. In *Meeks* the Court held as follows:

> Pursuant to a rule 3.850 motion, a prisoner is entitled to an evidentiary hearing unless the motion and the files and the records *conclusively* show that he is entitled to no relief. If the prisoner raises a matter that may properly be considered in a rule 3.850 motion, the trial judge reviewing the motion must either attach that portion of the case file or record which conclusively shows that the prisoner is entitled to no relief or grant an evidentiary hearing.

Meeks v. State, 382 So.2d 673, 676 (Fla. 1980).

Appellant argues that in the instant case the trial court violated the rule announced in *Meeks* by summarily denying his 3.850 motion without attaching that portion of the case file or record which conclusively showed why appellant was not entitled to an evidentiary hearing. Because of this alleged violation of *Meeks*, appellant claims he is entitled to an evidentiary hearing on his motion for post-conviction relief.

[3] We disagree. This Court's decisions in *Vagner* and *Meeks* were rendered after the trial court had ruled on appellant's 3.850 motion. Therefore, when the trial court denied appellant's motion it was not necessary to attach that portion of the record which conclusively showed that he was entitled to no relief, as the motion charging ineffective assistance of *private* counsel was defective on its face and, therefore, legally insufficient. The only way in which this Court is able to determine whether appellant was erroneously denied an evidentiary hearing on his claim of ineffective assistance of counsel is to consider the entire record for the purpose of determining whether he was entitled to no relief. We have done so and find that the trial court properly denied appellant an evidentiary hearing on his claim of ineffective assistance of counsel. There can be no harmful error in the court's failure to attach a copy of the entire record to its order.

[4] As a third ground in support of his motion for post-conviction relief, appellant argues that the trial court should have granted his counsel's motion, made at the 3.850 proceeding, to withdraw. Withdrawal was warranted, he contends, because of a conflict of interest which developed as a result of allegations by the state regarding the propriety of appellant's counsel's deci-

sion to file a motion for post-conviction relief on behalf of appellant. Our review of the record indicates that while the state was critical of the motives behind defense counsel's timing in raising the motion for post-conviction relief, this criticism did not create any conflict of interest between appellant and his counsel. Accordingly, we find that the trial court properly denied the motion to withdraw.

Appellant does not present any argument in his brief concerning the remaining issues raised in his 3.850 motion other than to state that the trial court summarily denied each of the requests for relief without attaching portions of the record which conclusively show that he is not entitled to relief, that each claim he raised has merit; and that he does not intend to waive these claims for purposes of appeal.

In determining the merit of appellant's remaining claims, we have reviewed the entire record. We find that every claim raised either should have been raised and was not, or was not a proper issue for review under a 3.850 motion, or failed to state grounds upon which relief could have been granted pursuant to a motion to vacate, or was conclusively refuted by the record, or was decided adversely to appellant by this Court on direct appeal.

We now consider the propriety of appellant's second sentencing hearing, which he contests, on several points. First, appellant questions the sufficiency of the findings relied on by the sentencing court, arguing that four of the aggravating circumstances were improperly found applicable. Specifically, he contends that his actions did not create a great risk of death to many persons, that it was improper to find as aggravation that the murder was committed immediately after commission of the crime of rape, that it was not especially heinous, atrocious, or cruel, and that the finding that it was committed for pecuniary gain must be stricken as an improper doubling of aggravating factors. Only one argument has merit.

[5] Appellant's action *did* create a great risk of death to many persons. Section 921.141(5)(c), Florida Statutes (1973). There were four non-participating, unarmed, and innocent people present in the restaurant during the shoot-out between appellant and the police. That they took refuge on the floor behind tables and counters certainly does not mean that they were in no risk of being killed. A gun battle in a confined area certainly created a "likelihood" or "high probability" that someone, bystanders or police officers, would be hit and killed. *See Kampff v. State*, 371 So.2d 1007 (Fla.1979); Section 921.141(5)(c) was applicable.

[6] Also properly applied was the aggravating circumstance that the murder was committed after commission of a rape. Section 921.141(5)(d). Appellant argues that because the crime of "rape" was repealed in 1974, no such offense existed at the time of this killing and so section 921.141(5)(d), which specifically refers to "rape", cannot be applied to him. We have considered similar arguments before, and found them without merit. *See Adams v. State*, 412 So.2d 850 (Fla.1982), and *Hitchcock v. State*, 413 So.2d 741 (Fla.1982).

[7] Likewise without merit is appellant's speculation regarding improper doubling of aggravating circumstances. There was no finding that the killing was committed during a robbery, (section 921.141(5)(d)), and so the application of section 921.141(5)(f), relating to capital felonies committed for pecuniary gain, was permissible.

[8] There is merit, however, to appellant's argument regarding the finding that the killing was heinous, atrocious, and cruel. *See* section 921.141(5)(h). Applicable here is the observation made in *Williams v. State*, 386 So.2d 538, 543 (Fla.1980), quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974): "The murder, while utterly reprehensible, was not 'accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" We have held that killings similar to this

one were not heinous, atrocious, and cruel. *See Williams v. State; Fleming v. State*, 374 So.2d 954 (Fla.1979); and *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). There being no finding of mitigating circumstances, the error was harmless. *Sireci v. State*, 399 So.2d 964 (Fla. 1981).

[9] The final point regarding the propriety of the findings relied on by the court in sentencing is whether it erroneously limited consideration of mitigating circumstances. Appellant argues that the court's failure to properly consider nonstatutory mitigating circumstances is evidenced by its refusal to appoint experts to examine him with respect to the similarities between the circumstances of this crime and those of the murder of his "stepfather." Had the court complied with his request, he contends, the psychological information discovered could have affected the penalty imposed.

The record demonstrates, however, that the court did consider appellant's mental condition. Several witnesses testified regarding appellant's relationship with his stepfather, and the effect on him of the latter's murder. The judge's findings, nevertheless, state that there was no evidence of extreme mental or emotional disturbance at the time of the crime.

Appellant clearly is unhappy with the conclusions, but they are within the domain of the sentencing court and we find nothing in the record which mandates a different result. The judge was not compelled to call the experts requested, and since he did consider the question, we will not fault his conclusions.

[10] Appellant's second point on appeal is that the sentencing court abused its discretion by denying his motion for a continuation of sentencing and that as a result, he was denied the rights of due process, equal protection, and effective assistance of counsel. Because there were only six weeks between the time that the federal court denied rehearing on its habeas corpus order and resentencing, appellant argues that he was prevented from adequately investigating and developing mitigating evidence relating to his mental condition. We disagree.

The federal court's initial habeas corpus order was issued over three months before the date on which appellant was sentenced. He could have begun preparing for resentencing at that time. *Valle v. State*, 394 So.2d 1004 (Fla.1981), which appellant cites, held that twenty-four days, from the date of arraignment, was not long enough to prepare for trial. The time provided here, however, was adequate for what had to be done.

[11] Appellant's third point on appeal is that he was denied due process and effective assistance of counsel by the sentencing court's refusal to allow his attorneys a night's rest before presentation of closing argument. In requesting the continuance, defense counsel argued that they were exhausted from the long day and could not in that condition, provide competent representation. The court disagreed, and instead completed the hearing without a summation by appellant's attorneys. We do not agree that the court's action denied appellant the rights which he claims that it did.

The court did *not* refuse counsel the opportunity to present closing argument—it refused to delay presentation thereof until the next morning. Appellant's attorneys could have given a closing argument had they been willing to do so that evening. In *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), cited by appellant, counsel for the defendant was denied *any* chance of making a closing argument.

[12] It was within the sentencing court's discretion to grant or refuse the motion for continuance. The presiding judge evidently felt that all of the parties involved were sufficiently fit to complete the proceedings that evening rather than continuing them into the following day. He, the attorneys for both sides, and everyone else necessary to conduct the hearing had been present all day, so appellant's attorney was not subjected to any more

ple. Nevertheless, the prosecutor stated he could not think of anything that might serve in mitigation. That he did not feel it necessary to review his file in order to reach this conclusion does not strike us as odd or improper.

[15] Because the *Brady* request was not specific and the prosecutor adequately responded to the general *Brady*-information inquiry, and because his answer was that he was aware of no such evidence, it was appellant's burden to show that the state did possess some specific information. He has failed to do so, even in a speculative way, and thus we can find no shortcoming in the sentencing proceeding in that respect.

Having reviewed each of the issues on appeal, and finding that none warrant vacation of appellant's death sentence, the same is hereby affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, SUNDBERG and McDONALD, JJ., concur.

Allen Leroy ANDERSON, Appellant,

v.

STATE of Florida, Appellee.

No. 52771.

Supreme Court of Florida.

Sept. 2, 1982.

Rehearing Denied Nov. 2, 1982.

Defendant was convicted in the Circuit Court in and for Brevard County, A.J. Hosemann, Jr., J., of first-degree murder and he was sentenced to death, and he appealed. The Supreme Court held that: (1) deputies violated defendant's Sixth Amendment right to counsel during trip from Minnesota to Florida in obtaining defendant's statement, and (2) statement defendant made during plea negotiations was inadmissible.

Adjudication and sentence vacated and new trial ordered.

McDonald, J., concurred with an opinion.

Boyd, J., dissented with an opinion with which Adkins, J., concurred.

1. Criminal Law ⇐1026

If predicate for judgment of conviction is substantially impaired by inclusion of inadmissible statement, it is proper and necessary for the Supreme Court, in death case, to review record and determine whether that statement was in fact admissible, despite fact that defendant pleaded nolo contendere.

2. Criminal Law ⇐1026

Rule that defendant cannot plead nolo contendere and reserve his right to appeal unless legal issue reserved for appeal is dispositive of case cannot be applied to death cases.

3. Criminal Law ⇐641.2

After adversary proceedings have begun, accused is entitled to assistance of counsel. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16.

4. Criminal Law ⇐641.3

Sixth Amendment applies to critical stages of criminal proceedings, and accused is guaranteed that he need not stand alone against state at any stage of prosecution, formal or informal, in court or out, where counsel's absence might derogate from accused's right to fair trial. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐412.2(4)

Police deputies violated defendant's Sixth Amendment right to counsel in obtaining his statement during trip from Minnesota to Florida where defendant had been indicted prior to trip so that adversary proceedings had already commenced, deputies knew that, during trip, defendant had no

Supreme Court of the United States

No. A-498

JAMES DAVID RAULERSON,

Petitioner,

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of ~~counsel for~~ petitioner~~(s)~~

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 1, 1983

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 1st
day of December, 1982

James David RAULERSON, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.

No. 79-267-Civ-J-WC.

United States District Court, M. D. Florida, Jacksonville Division.

May 9, 1980.

On Petition for Rehearing June 24, 1980.

Petitioner applied for writ of habeas corpus seeking to invalidate death sentence imposed on him by Florida Court. The District Court, Castagna, J., held that state trial court's reliance in part on information contained in presentence investigation report in deciding to sentence petitioner to death, when information contained in that report was shown to petitioner's counsel but not shown to petitioner prior to sentencing, denied petitioner due process; thus, petitioner's execution would be stayed pending a new sentencing hearing.

Relief granted.

1. Constitutional Law ⇐270(2)

State trial court's reliance in part on information contained in presentence investigation report in deciding to sentence petitioner to death, when information contained in that report was shown to petitioner's counsel but not shown to petitioner prior to sentencing, denied petitioner due process; thus, petitioner's execution would be stayed pending a new sentencing hearing. U.S.C.A.Const. Amend. 14.

2. Criminal Law ⇐986.5

Defendant has the constitutional right to know and to test accuracy of any statement in presentence report upon which sentencing judge relies. U.S.C.A.Const. Amend. 14.

On Petition for Rehearing

3. Criminal Law ⇐938(1)

Before a new trial or rehearing is granted on basis of newly-discovered evidence, such evidence must have been in existence prior to court's disposition of case and it must be made to appear that even by continuous exercise of due diligence the evidence could not have been presented at first hearing; furthermore, evidence must be material and not cumulative or impeaching, and it must be of such weight or importance as to require a different result. Fed. Rules Civ.Proc., Rule 59, 28 U.S.C.A.

4. Habeas Corpus ⇐30(3)

Notwithstanding contention that petitioner failed to object to sentencing procedure in trial court, District Court, in deciding whether to grant petition for writ of habeas corpus on ground that trial court expressly relied in part on information contained in presentence investigation report in making its sentencing decision when information contained in that report was not shown or otherwise made known to petitioner prior to his sentencing, would consider a due process issue where there was no showing that state raised issue of waiver in state Supreme Court and where state Supreme Court ruled on the merits of the case. U.S.C.A.Const. Amend. 14.

David J. Busch, Asst. Public Defender, Second Judicial Circuit, Tallahassee, Fla., for petitioner and James David Raulerson, pro se.

Carolyn Snurkowski, Asst. Atty. Gen., Tallahassee, Fla., Ralph N. Greene, III, Asst. State Atty., Jacksonville, Fla., Secretary of the Florida Dept. of Corrections, Tallahassee, Fla., Superintendent, Florida State Prison, Starke, Fla., Jim Smith, Atty. Gen., State of Florida, Robert Graham, Governor, State of Florida, Tallahassee, Fla., for respondent.

ORDER

CASTAGNA, District Judge.

James David Raulerson, an inmate at Florida State Prison in Starke, Florida, pe-

titions this Court pursuant to 28 U.S.C. § 2254 to issue a Writ of Habeas Corpus that would invalidate the death sentence imposed upon him on August 20, 1975, by the Circuit Court in and for Duval County, Florida.

Statement of the Case

On April 27, 1975, in the aftermath of a rape and robbery committed by Petitioner at a Jacksonville restaurant, Officer Michael David Stewart was shot and killed. Petitioner was convicted of the first degree murder of that police officer by a jury in August, 1975. At the penalty phase of his trial on August 7, 1975, a majority of the jury recommended that Petitioner be sentenced to death. The trial judge ordered a presentence investigation report of Petitioner. The judge expressly relied upon that report, at least in part, in sentencing Petitioner to death on August 20, 1975. At the sentencing hearing, the trial court filed written findings of fact in justification for its imposition of the death sentence.

Petitioner's conviction and sentence were affirmed on direct appeal to the Supreme Court of Florida. *Raulerson v. State*, 358 So.2d 826 (Fla.1978). Among other issues, Petitioner argued that he was denied due process of law pursuant to the United States Supreme Court's opinion in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) because he was not shown or made aware of the contents of the presentence investigation report prior to his sentencing. 358 So.2d at 831–32.

Raulerson filed his Petition for Writ of Habeas Corpus in this Court on March 23, 1979. Both parties agreed that an evidentiary hearing was not necessary. Respondent filed a Motion to Expedite consideration of the Petition on the same day that the Governor of Florida signed a Warrant directing that Petitioner be executed between May 16 and May 23, 1980. Subsequently, on April 24, 1980, Petitioner filed an Application for Stay of Execution pending final disposition of this cause. This Court granted Respondent's Motion to Expedite on April 28, 1980.

Issues for Consideration

Petitioner asserts that he was denied due process of law because the trial court expressly relied in part on information contained in the presentence investigation report in making its sentencing decision when the information contained in that report was not shown or otherwise made known to Petitioner prior to his sentencing, in violation of the principles announced in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Petitioner also raises an equal protection of law argument, claiming that the holdings of the Supreme Court of Florida in *Raulerson v. State*, 358 So.2d 826 (Fla.1978) and *Funchess v. State*, 367 So.2d 1007 (Fla.1979) reach opposite conclusions on the same *Gardner*-related due process issue.

Findings of Fact

Upon review of the record, this Court finds that: (1) The trial court relied in part on information contained in the presentence investigation report in its sentencing decision. (2) Although Petitioner's counsel did receive and review the presentence investigation report, the record fails to show that Petitioner either received or reviewed, independently or with counsel, that report prior to his sentencing on August 20, 1975. (3) Petitioner, by affidavit, asserts that only after his sentencing did he learn of certain of the factual allegations contained in the report which he asserts are untrue.

The relevant part of the transcript of the sentencing hearing on August 20, 1975 is reproduced below:

THE COURT: Do you, or anyone on your behalf, have any legal cause to show why sentence should not be pronounced?

MR. STEDEFORD: No legal cause at this time, Your Honor.

THE COURT: Is there anything further in mitigation or aggravation?

MR. STEDEFORD: Your Honor, I talked with Mr. Raulerson about the matter earlier. Anything he might say, we realize, of course, that you have the Presentence Investigation Report that you

have provided to me. I have gone over it, I know that you have.

THE COURT: Mr. Stedeford, I requested my secretary to give you two copies of that so Mr. Raulerson may have one also.

MR. STEDEFORD: *I have not given him his copy. I received a second copy earlier just a few moments ago, but I will give him one at the conclusion of this hearing.*

Your Honor, Mr. Raulerson and I did discuss what mitigation we might bring before the Court. We, frankly, feel as though it would do little good to talk of mitigation in this case, and we feel as though you have considered it, and that Mr. Raulerson and I both concur that anything we might say would not change what you might be doing today.

At this time, Your Honor, there's nothing further to say in mitigation.

THE COURT: Does the State have anything further in aggravation?

MR. GREENE: Nothing, Your Honor, other than the comments that the State, of course, made and brought—and put into evidence at the sentencing phase of the trial.

THE COURT: Thank you, gentlemen. (Whereupon, the Court proceeded to sentence the Defendant.) (emphasis supplied)

Respondent asserts that Petitioner's trial counsel represented at the August 20, 1975 hearing that he had discussed the contents of the presentence investigation report with Petitioner prior to the sentencing hearing. If so, such discussion is not disclosed in this record. The record reflects only that Petitioner's trial counsel had discussed with Petitioner the "matter" of mitigation or aggravation and "what mitigation we might bring before the Court" (see transcript above). While this may be close, the unique nature of the death penalty precludes its imposition on less than clear and unequivocal compliance with all procedural requisites. There is no positive allegation in the transcript or any substantial indication in the record as a whole that Petitioner and counsel discussed the contents of the presentence investigation report prior to Petitioner's August 20, 1975 sentencing hearing or that Petitioner was otherwise aware of the contents of that report prior to his sentencing. In an August 22, 1977 affidavit Petitioner stated that he:

> "... did not review the presentence investigation report with my attorney, Walter R. Stedeford, prior to my being sentenced."

Petitioner's trial counsel, Mr. Stedeford, stated in a June 2, 1977 letter to Petitioner's appellate counsel:

> "I cannot state as a fact that I reviewed the presentence investigative report with Mr. Raulerson and questioned him concerning the accuracy of the allegations."

(4) The trial court's written findings of fact were furnished to Petitioner and his trial attorney immediately prior to the trial court's pronouncement of sentence.

Conclusions of Law

1. *Due Process*

[1] In *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court confronted a situation in which Petitioner Gardner had been convicted of first degree murder in a Florida court. The judge based his imposition of the death penalty, in part, on information provided in a presentence investigation report. The presentence investigation report contained a confidential section which was not disclosed to Defendant or counsel. Defense counsel had apparently received a copy of the nonconfidential part of the report, but did not request disclosure of the full report. The judge did not comment on the information from the undisclosed part of the report. That undisclosed section was not in the record on appeal to the Florida supreme court, which affirmed Gardner's conviction and sentence. *Gardner v. State*, 313 So.2d 675, 677 (Fla.1975) (Ervin, Boyd, JJ., concurring in part and dissenting in part).

The United States Supreme Court granted certiorari and reversed the decision of the Florida supreme court. Initially, the

Supreme Court distinguished *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), in which the Court had affirmed the conviction and death sentence of an appellant who had been sentenced, at least in part, on the basis of information provided in an undisclosed presentence investigation report. The *Gardner* Court recognized that the material facts about the appellant in *Williams* which were in the report "were described in detail by the trial judge in open court." 430 U.S. at 356, 97 S.Ct. at 1203. The *Gardner* Court also noted that "the passage of time justifies a re-examination of capital-sentencing procedures ... against evolving standards of procedural fairness in a civilized society." *Id.* at 357, 97 S.Ct. at 1204 (footnote omitted). Thus, the Court stated:

> (D)eath is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
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> • • • • • •
>
> (I)t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.

Id. at 357–58, 97 S.Ct. at 1204–05 (citations omitted).

Recognizing that "(t)he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence," *id.* at 358, 97 S.Ct. at 1204, the Court concluded:

> (P)etitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

Id. at 362, 97 S.Ct. at 1206.

[2] Counsel for Respondent seeks to urge upon this Court as a distinction between this case and *Gardner*, that in *Gardner* the report was not furnished to defense counsel and that by its reference to that fact, *Gardner* is so limited; that is to say, since in this case the report was furnished to defense counsel, no more is required, even by *Gardner*. Obviously, if counsel did not review the report with Petitioner, counsel would have no way of knowing whether Petitioner had any corrections, additions or deletions to make to the report. That knowledge is peculiarly in Petitioner himself and "the defendant has a constitutional right to know and to test the accuracy of any statement in the presentence report upon which the sentencing judge relies." *United States v. Woody*, 567 F.2d 1353, 1361 (5th Cir.), *cert. denied*, 436 U.S. 908, 98 S.Ct. 2241, 56 L.Ed.2d 406 (1978). That right is the right of Petitioner as well as his counsel. Petitioner must be given the opportunity to rebut and deny any portion of the report and such opportunity clearly requires personal knowledge of the information to be rebutted. Both the "appearance and reality of due process" must exist in a sentencing proceeding. *United States v. Espinoza*, 481 F.2d 553, 558 (5th Cir. 1973). Mr. Justice Brennan in his separate opinion in *Gardner* stated the matter simply:

> (T)he Due Process Clause of the Fourteenth Amendment is violated when a defendant facing a death sentence is not informed of the contents of a presentence investigation report made to the sentencing judge.

430 U.S. at 364, 97 S.Ct. at 1207 (Brennan, J.).

Finally, this Court finds that Petitioner did not waive his constitutional right to be informed of the contents of the presentence investigation report. As in *Gardner*, "there is no basis for presuming that the defendant himself made a knowing and intelligent waiver" of the constitutional error reflected in the record before this Court. *Id.* at 361,

97 S.Ct. at 1206. *See also Smith v. Estelle*, 602 F.2d 694, 701 n.8. (5th Cir. 1979), *cert. granted*, 445 U.S. 926, 100 S.Ct. 1311, 63 L.Ed.2d 758 (1980).

2. *Equal Protection*

This Court expressly refrains from consideration of the merits of Petitioner's equal protection issue because the due process of law claim requires the granting of the requested relief. Petitioner and Respondent agree, as does the Court, that the due process and equal protection issues are properly before the Court with respect to the exhaustion doctrine articulated by the United States Court of Appeals for the Fifth Circuit in *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978) (en banc).

It is therefore,

ORDERED:

1. The Application for Stay of Execution is granted and Petitioner's execution is stayed. The Judgment of Commitment and sentence of death imposed by the State is held to be ineffective and void and any process, order or warrant issued by any judicial or executive officer purportedly in enforcement of such judgment and sentence is likewise held to be ineffective and void.

2. The Petition for Writ of Habeas Corpus is granted, however Petitioner shall remain in the custody of the Superintendent of the Florida State Prison. The State of Florida shall have sixty days within which to afford to Petitioner a new sentencing hearing and imposition of sentence, without the necessity of an advisory jury, providing for Petitioner, his counsel and counsel for the State full opportunity to be heard regarding the content of the presentence investigation report, as well as other matters properly considered by the trial court concerning Petitioner's sentence; absent such hearing without good cause, Respondent shall release Petitioner from custody.

3. A certified copy of this Order be immediately served by United States Marshal upon the Secretary of the Florida Department of Corrections; the Superintendent of the Florida State Prison; Honorable Jim Smith, Attorney General of the State of Florida and Robert Graham, Governor of the State of Florida.

ORDER

On Petition for Rehearing

This cause has been considered by the Court on Respondent's Petition for Rehearing. The office of the State Attorney for the Fourth Judicial Circuit of Florida has appeared in the case as counsel of record for the Respondent. Subsequent to the filing of the Petition for Rehearing and while the Petition was still pending, counsel submitted an article to the Florida *Times Union* which article was published on May 30, 1980, a copy of which is attached and made a part hereof. Objection to rulings or decisions of the Court are more properly handled by inclusion in a petition for rehearing or by appeal. The Court cannot rule on matters not set out in the pleadings or motions.

The language on page 2 of the Memorandum in Support of the Petition for Rehearing, stating that Petitioner's limited claim is that he did not receive a copy of the PSI report, fails to recognize the proper scope of the Petitioner's claim and the Court's ruling thereon. Petitioner's claim is not limited to failure to receive a copy of the report; it includes the claim which the Court found to be valid that the Petitioner was never informed of the contents of the presentence investigation report before sentencing either by receipt of a copy, discussion with counsel or otherwise.

The Supreme Court of the United States in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), held that the sentencing process as well as the trial itself must satisfy the requirements of the Due Process Clause, and went on to vacate the death sentence of Gardner because of its conclusion that the Due Process Clause of the Fourteenth Amendment is violated when a defendant facing a death sentence is not informed of the contents of a presentence investigation report.

Counsel for Respondent has suggested that Petitioner's attorney did discuss the

presentence report with the Petitioner. If so, it was the responsibility of counsel to make such discussion clearly appear in the record at the time of sentencing. It did not so appear.

[3] It is well established that before a Rule 59 new trial or rehearing is granted on the basis of "newly discovered evidence," such evidence must have been in existence prior to the Court's disposition of the case and it must be made to appear that even by the continuous exercise of due diligence the evidence could not have been presented at the first hearing. Furthermore, the evidence must be material and not cumulative or impeaching, and it must be of such weight or importance as to require a different result. *See e. g., N.L.R.B. v. Jacob E. Decker and Sons*, 569 F.2d 357, 363–64 (5th Cir. 1978) and cases cited therein.

Respondent contends that because of the attorney-client privilege, the trial attorney was precluded from providing this information until the privilege was waived through Petitioner's action in alleging that he had inadequate representation. Although resting on a generally sound principle, such an argument in this case is frivolous and totally without merit. The same trial attorney, on June 2, 1977, in response to a May 26, 1977 letter from Petitioner's appellate counsel, furnished a letter in which trial counsel alleged that he was unable to state as a fact that he reviewed the presentence investigation report with Petitioner. The attorney-client privilege on the subject of communications and actions between Petitioner and his trial counsel regarding the PSI report was clearly waived at the time that the June 2 letter was made a part of the record. Although Respondent had full opportunity to review the matter with such trial counsel thereafter, there is no showing of any diligent attempt by Respondent to further investigate this circumstance prior to May 1, 1980. The Respondent alleges that the Petitioner considered the attorney-client relationship intact as late as May 1, 1980. The attorney-client relationship is not amenable to such manipulation. If such a position was in fact taken by Petitioner, it could not reverse the waiver of confidentiality effected by the publication and use by Petitioner of the letter of June 2, 1977.

Respondent cites *United States v. Woodall*, 438 F.2d 1317 (5th Cir. 1970), *cert. denied*, 403 U.S. 933, 91 S.Ct. 2262, 29 L.Ed.2d 712 (1971) to support its argument that the attorney-client privilege is breached by a defendant's attack on the effectiveness of his counsel. This is, of course, true. However, it is not the only way in which the attorney-client privilege may be waived. Petitioner's affidavit that "he did not review the PSI report" with his trial attorney prior to sentencing and his trial attorney's letter of June 2, 1977 are explicit waivers of the privilege regarding communication between attorney and client as to the PSI report and its contents. *United States v. Woodall, supra* at 1324–25. Furthermore, if the act of communication is at issue, as opposed to the substance of any such communication about the presentence investigation report, there is a serious question whether the privilege is applicable at all. *See e. g., Clanton v. United States*, 488 F.2d 1069 (5th Cir.), *rehearing en banc denied*, 490 F.2d 992, *cert. denied*, 419 U.S. 877, 95 S.Ct. 140, 42 L.Ed.2d 116 (1974), *quoting with approval United States v. Kendrick*, 331 F.2d 110, 113–14 (4th Cir. 1964).

The alleged "newly discovered" evidence is not newly discovered at all; it is simply newly concluded, and while it is clear that on the issue of due diligence alone this Petition for Rehearing should be denied, the Court observes that the evidence allegedly newly-discovered by Respondent is not of such weight or importance as to require a different result in this case, nor does it raise an issue of fact to be resolved on rehearing. Mr. Stedeford's late affidavit reveals that even after reviewing the entire trial transcript, he still does not state as a fact that he reviewed the presentence report with the Petitioner prior to imposition of sentence but states that it is his present "opinion and belief" that he did so. This is simply controverted evidence in conflict with his own letter of June 2, 1977 and with the Petitioner's affidavit to the contrary.

Respondent contends that the trial court did not use any of the information contained in the presentence investigation report in the written findings of fact to support the imposition of the death penalty. This contention is summarily disposed of to the contrary by the statement of the trial judge in the findings of fact that such findings "are based upon the record before this Court including ... the presentence investigation report furnished to this Court by the Florida Probation and Parole Commission."

[4] Finally, Respondent claims that this Court has "inappropriately overlooked" *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), contending that because Petitioner failed to object to the procedure in the trial court, he waived the right to do so and may not now raise the due process issue before this Court; however, since there is no showing that the State raised the issue of waiver in the Florida supreme court and the Florida supreme court nevertheless ruled on the merits of the case, the due process issue was still open for consideration by this Court. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 147–54, 99 S.Ct. 2213, 2219–23, 60 L.Ed.2d 777 (1979); *Moran v. Estelle*, 607 F.2d 1140, 1141–43 (5th Cir. 1979).

The remaining contentions of Respondent are merely argumentative and present no basis for rehearing. Respondent having shown no basis upon which the Court should grant a rehearing, it is hereupon

ORDERED:

1. That Respondent's Petition for Rehearing is denied without argument.

2. That Respondent's Motion to Stay Proceedings is granted to the extent that the Order of this Court of May 9, 1980 is amended by extending the time for compliance with the provisions of Paragraph 2 thereof to and including July 25, 1980.

APPENDIX

The Florida Times-Union, Jacksonville, Friday, May 30, 1980 ***A-11

Prosecutor calls for curbs on federal courts

Austin cites Raulerson death stay as example of flaws in system

By ED AUSTIN
State attorney, 4th Circuit

Murderer and professional robber James David Raulerson, and Jerry Tant, a 6-foot-6-inch, 260-pound giant, stormed across the Southeast on a violent, criminal rampage in early 1975.

During April, the pair robbed a grocery store and several restaurants in Alabama, then struck Florida. On April 26, 1975, they robbed the Brown Derby Restaurant in Tallahassee.

The next night they assaulted the Sailmaker Restaurant in Jacksonville.

Point of view

The robbers always wore ski masks, carried handguns and hit businesses at opening or closing hour. Phones were ripped out and employees were threatened, terrorized and forced to lie face-down on the floor as the offenders escaped with the cash receipts.

In Jacksonville, Raulerson added a vicious, new twist to their "method" by raping and brutalizing a young schoolteacher working part-time at the restaurant.

But the Sailmaker robbery, discovered in progress, was reported to police. Even as Tant and Raulerson robbed and raped, Jacksonville sheriff's officers raced to the scene.

Arriving first, two young deputies, Mike Stewart and Jim English, suddenly faced Tant's gun as he burst out the door. English and Stewart fired at short range. Tant died in the exchange.

Alerted by the gunshots, Raulerson deserted his rape victim and ran; almost headlong into the deputies. He fired first at English then wheeled and shot Stewart.

He emptied his loaded revolver at the officers.

English was saved when a direct hit to the chest was deflected by a common, ballpoint pen. Mike Stewart, shot through the heart from just 10 feet away, died instantly.

employee since the sheriff did not employ Johnson as a deputy sheriff but appointed him, giving him the same power as the sheriff. The issue posed therein was whether the Police Officers' Bill of Rights was applicable to the constitutional office of sheriff, and the District Court held that it was not applicable.

Since deputy sheriffs have not been identified as employees by the courts of this state, we cannot assume that the Legislature intended to include them within the definition of public employee without express language to this effect. In the absence of language including deputy sheriffs within the definition set forth in Chapter 447, Florida Statutes (1975), we find that they are not encompassed by the act.

The determination that a deputy sheriff is not a public employee is not inconsistent with our conclusion that the sheriff is a public employer since there may be persons employed by the sheriff, such as typists, stenographers, bookkeepers, cooks, janitors or others, who are not deputy sheriffs and whose duties and powers do not constitute a part of the sovereign power, who would be embraced by the definition of "public employee" in Section 447.203(3), Florida Statutes (1975). Cf. *Blackburn v. Brorein*, supra.

Accordingly, we hold that a sheriff is a "public employer" within the definition of Chapter 447, Florida Statutes (1975), but that a deputy sheriff is not a "public employee" within the contemplation of said act. Therefore, the decision of the District Court of Appeal is quashed insofar as it is inconsistent with this decision, and this cause is remanded for further proceedings consistent herewith.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., concur.

James David RAULERSON, Appellant,

v.

STATE of Florida, Appellee.

No. 47991.

Supreme Court of Florida.

March 16, 1978.

Rehearing Denied June 5, 1978.

Defendant was convicted by a jury in the Circuit Court, Duval County, Susan H. Black, J., of the first-degree murder of victim police officer arising out of defendant's attempted flight from restaurant after committing rape and robbery. Defendant was sentenced to death. Defendant appealed. The Supreme Court, Adkins, J., held that: (1) mere presence of discretion in sentencing procedure in Florida statute authorizing death penalty does not render such statute unconstitutional; (2) death penalty is constitutional in that it is not cruel and unusual punishment; (3) proof of identity of victim was established beyond reasonable doubt, even though indictment charged that defendant murdered "Michael" and proof showed that "Mike" was name of victim; (4) under circumstances, no error occurred in failing to show defendant himself presentence investigation report before judge imposed sentence, and (5) under circumstances, death penalty was proper sentence.

Judgment and sentence affirmed.

1. Criminal Law ⇐1206(1)

Mere presence of discretion in sentencing procedure in Florida statute authorizing death penalty does not render such statute unconstitutional. West's F.S.A. § 921.141; West's F.S.A.Const. art. 1, §§ 2, 9, 17; U.S.C.A.Const. Amends. 5, 8, 14.

2. Criminal Law ⇐1213

Capital punishment is not, per se, violative of United States Constitution or Flori-

da Constitution; death penalty is constitutional in that it is not cruel and unusual punishment. U.S.C.A.Const. Amends. 5, 8, 14; West's F.S.A.Const. art. 1, §§ 2, 9, 17.

3. Homicide ⇐229

Proof of identity of murder victim must be established beyond a reasonable doubt; if circumstantial evidence is resorted to, proof must be most convincing, satisfactory, unequivocal proof that is compatible of nature of case.

4. Homicide ⇐229

In prosecution for first-degree murder of victim police officer arising out of defendant's attempted flight from restaurant after committing robbery and rape, testimony from police officer victim's partner that victim was shot at restaurant, such officer's identification of individual in a photograph as being victim, evidence that pathologist performed autopsy on body of person identified in photograph as victim, and testimony of another police officer, who saw victim fall on being hit by gun fire and who pulled victim out of line of fire, that victim had no pulse and was dead was sufficient evidence to prove fact that victim died.

5. Indictment and Information ⇐180

In a criminal case, a material variance between name of victim alleged, and that proved, is fatal; primarily, it is a question of identity and essential thing in requirement of correspondence between allegation of victim's name in indictment and proof is that record must be such as to inform defendant of charge against him and to protect him against another prosecution for same offense.

6. Homicide ⇐229

In prosecution for first-degree murder, proof of victim's identity was established beyond a reasonable doubt, even though information charged that defendant murdered "Michael" and proof showed that "Mike" was name of victim, inasmuch as judicial notice was taken of fact that person named "Michael" is generally referred to as "Mike" with result that defendant could not have been embarrassed in preparation of his defense; defendant was protected against another prosecution for same offense given fact that identity of victim as alleged in indictment with person who was shot by defendant was clearly shown by record.

7. Homicide ⇐253(1)

In prosecution for first-degree murder of victim police officer arising out of defendant's attempted flight from restaurant after committing robbery and rape, evidence sustained guilty verdict.

8. Criminal Law ⇐986

Where, in first-degree murder prosecution in which death sentence was imposed, record showed that defense counsel was provided with a copy of presentence report and that he discussed matter of mitigation with defendant prior to time judge imposed sentence and that presentence report was made part of record and defendant on appeal had not referred to any portion which he desired to rebut or explain, no error occurred in failing to show defendant himself presentence investigation report prior to time judge imposed sentence; presentence report, as required, was furnished to defense counsel.

9. Criminal Law ⇐986

The sentencing process must be a matter of reasoned judgment rather than an exercise in discretion.

10. Homicide ⇐354

In prosecution for first-degree murder of victim police officer arising out of defendant's attempted flight from restaurant after committing robbery and rape, death penalty was proper sentence, where homicide was heinous and cruel, even though pistol shot caused immediate death, for there were many shots fired and victim was well aware that his life was in danger from moment he entered restaurant, defendant had significant history of prior criminal activity consisting of a series of robberies, defendant was seeking pecuniary gain and had committed a rape prior to murder committed during his effort to flee, defendant was "trigger man" and jury's advisory sentence consisted of eight recommending

death penalty and four recommending life imprisonment.

David J. Busch, Asst. Public Defender, Tallahassee, for appellant.

Robert L. Shevin, Atty. Gen., and Andrew W. Lindsey and Charles W. Musgrove, Asst. Attys. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

The defendant, Raulerson, at approximately 11:00 o'clock p. m., Sunday night, April 27, 1975, walked to the back door of the Sailmaker restaurant in Jacksonville, Florida, where he pointed a .38 caliber revolver at Leonard J. Wilson, a young man working at the restaurant. Raulerson then pulled a wool mask over his head, forcing Wilson to enter the restaurant and lie face down on the floor. Raulerson went to the manager's office where the manager, Robert E. Couture, was sitting with his wife, Nancy Couture, "cashing out receipts" for the restaurant. He forced them to lie on the floor with their face down and then was heard scooping the restaurant's money off the table. Raulerson, after cutting the telephone wire, went to the back of the restaurant where everyone present was forced to lie down with their face to the floor.

Raulerson then took a young secondary school art teacher who was working evenings at the restaurant, to a back room with him. He forced her to take off her clothes and place her mouth on his penis. He then inserted his penis in her vagina, later pulling his penis out of her vagina and ejaculating on her stomach.

In the meantime, Raulerson's cousin, Jerry Leon Tant, wearing a mask similar to the one worn by Raulerson, was standing guard over the others in the restaurant. Officer English, answering a call, came to the scene and started pushing a buzzer at the door of the restaurant. When there was no response to the buzzer, Officer English opened the door, saw Tant standing at the door with the mask on and an automatic pistol in his hand. He shot Tant with Tant falling to the floor. Officer English then bent over Tant.

Raulerson at this time left the young art teacher, went out into the main part of the restaurant, saw Officer English bending over Tant, and shot Officer English in the chest after which Officer English cried out that he was hurt. Officer Stewart, who was standing behind Officer English, started shooting Tant who was moving. Raulerson fired five more shots from his revolver, emptying the revolver and shooting Officer Stewart in the heart, killing him. During this period there were approximately fifteen shots fired. Raulerson then ran from the immediate scene of the shooting clutching his side where he had been shot, trying to escape. After finding no viable escape route, Raulerson returned, took off his mask, laid down his gun, and surrendered.

An indictment was returned charging defendant with murder in the first degree. He was convicted and the sentence of death was imposed. This appeal resulted.

[1, 2] Defendant attacks the Florida death penalty, contending that it violates the provisions of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 9 and 17, Florida Constitution, because arbitrary, standardless discretion still exists in the process by which the penalty is determined and imposed. He also says that the death penalty is inherently unconstitutional in that it is cruel and unusual punishment.

Among other things, the defendant says that the state attorney is granted unbridled discretion in that he has a choice in filing capital charges against one co-defendant and not against another equally culpable co-defendant; that he can seek conviction for any lesser degree of a capital offense or for a lesser offense; and that he has discretion in plea negotiations.

In considering the question of discretion in the sentencing procedure, this Court in *State v. Dixon*, 283 So.2d 1 (Fla.1973), discussed *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and said:

"The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia, supra*; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman v. Georgia, supra*.

"Discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla.Const., art. IV, § 8, F.S.A., and U.S.Const., art. II, § 2.

"Thus, if the judicial discretion possible and necessary under Fla.Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia, supra*, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest.

* * * * * *

"Capital punishment is not, *per se*, violative of the Constitution of the United States (*Furman v. Georgia, supra*) or of Florida. *Wilson v. State*, 225 So.2d 321 (Fla.1969)." pp. 6–7.

This reasoning and holding was followed and affirmed in *Sullivan v. State*, 303 So.2d 632 (Fla.1974). These cases are dispositive of the issues raised on this point.

Defendant then contends that the State failed to prove that Michael David Stewart was dead in that the proof failed to show that the Michael David Stewart named as the deceased in the indictment was the victim. He cites *Freeman v. State*, 101 So.2d 887–88 (Fla.2d DCA 1958), where the court held that proof of identity was an essential element of the corpus delicti. Defendant also refers to *Smith v. State*, 80 Fla. 710, 86 So.2d 640 (1920), where the information alleged that the victim's name was "Mary Ida Bogich," but the proof only shows that a "little girl" was killed. This was held insufficient.

[3] The proof of the identity of the deceased must be established beyond a reasonable doubt. If circumstantial evidence is resorted to, the proof must be the most convincing, satisfactory, unequivocal proof that is compatible of the nature of the case. *Johnson v. State*, 201 So.2d 492 (Fla.4th DCA 1967).

The court in *Trowell v. State*, 288 So.2d 506 (Fla.1st DCA 1973), set out nine methods that could be utilized in proving this element of the corpus delicti.

"It would have been manifestly easy for the State in its zeal to prove beyond a reasonable doubt that Raymond Jones was dead and to identify his dead body:

"1. There could have been the testimony of a relative or friend who saw his dead body as late as the funeral service;

"2. The funeral director, if he knew him personally;

"3. Any person who saw his corpse at the hospital who knew him personally;

"4. A photograph could have been taken of the cadaver which was autopsied which could later at trial have been identified by any person who knew him in his lifetime;

"5. A picture properly identified as Raymond Jones when alive could have been identified at trial as the person upon whom Doctor Klein performed the autopsy;

"6. Since allegedly death occurred sometime after the incident at the Santa Fe Bar, a certified copy of the death certificate could have been proffered;

"7. Circumstantial evidence, such as the contents of the body's billfold, rings and other personal effects, garments, etc., could have been utilized.

"8. Scientific evidence, such as fingerprints, identification of teeth, hair, etc., tending to establish identity, may have been available to the State; and finally

"9. The prosecution could have at least proffered the hospital records where presumably Raymond Jones died, as well as the bullet which caused the death of

the person whose body was somehow delivered to the autopsy room of the Alachua General Hospital on July 3, 1972." At 508.

[4] In the case *sub judice*, Officer James E. English testified that he went to the Sailmaker Restaurant with his "partner, Officer Mike Stewart," and that Mike Stewart was shot. He identified the individual in a photograph as being Mike Stewart. The pathologist performed an autopsy on the body of the person identified in the photograph as Officer Stewart. Officer Weathington saw "Officer Stewart" fall when he was hit by gunfire and he pulled "Officer Stewart" out of the line of fire. He checked "Officer Stewart's" pulse and stated "Officer Stewart has no pulse, and in my estimation, he was dead at the time." This evidence is sufficient to prove the fact that the victim died. See *Sims v. State*, 184 So.2d 217 (Fla.2d DCA 1966).

Defendant says there was a fatal variance in that the information charged that defendant murdered "Michael David Stewart" and the proof showed that "Mike Stewart" was the name of the deceased. Defendant relies upon *Davis v. People*, 19 Ill. 74 (1857), and *Timms v. State*, 44 Tenn. (4 Cold.) 138 (1867).

In *Davis v. People, supra*, defendant was charged with the murder of "Seth Taylor," but the victim was identified by the witnesses as "Taylor." This warranted a reversal.

Timms v. State, supra, charged defendant with the murder of "H. G. Trobeck," but the victim was referred to during testimony as "Gilbert Trobeck" or "the deceased Trobeck." The Tennessee Supreme Court held that in the absence of any proof that the victim was known as H. G. Trobeck, the variance was fatal and a new trial was ordered.

In *Branch v. State*, 94 Fla. 286, 115 So. 143 (1928), defendant was charged with assault with intent to commit murder upon one "Harry C. Beaty." The testimony showed that the true name of the victim was "Henry Beaty." While there was no testimony that the victim was as well known by the name of "Harry" as by the name of "Henry," or that he was generally or commonly known as "Harry," there was testimony that his true name was "Henry" and that he had been called "Harry" by his associates and others. The Court held that the testimony established the identity of the person alleged and proved to have been assaulted.

[5] A material variance between the name alleged, and that proved, is fatal. Primarily, it is a question of identity and the essential thing in the requirement of correspondence between the allegation of the name in the indictment and the proof is that the record must be such as to inform the defendant of the charge against him and to protect him against another prosecution for the same offense.

[6] It is general knowledge, and we take judicial notice of the fact that a person named "Michael" is generally referred to as "Mike." We hold that the proof of the identity of the deceased was established beyond a reasonable doubt. The defendant could not have been embarrassed in the preparation of his defense, and the identity of the victim as alleged in the indictment with the person who was shot by the defendant is clearly shown by the record. This protects the accused against another prosecution for the same offense.

[7] The evidence is sufficient to sustain the verdict of guilty of murder in the first degree.

After the rendition of the verdict a penalty hearing was held. The State produced witnesses who testified that defendant and his accomplice had committed an identical type of robbery in Hokes Bluff, Alabama, an act which defendant admitted in his own testimony during the penalty phase. A psychiatrist produced by defendant testified that defendant had a deepseated character disorder and that he was given to impulsive "acting-out" when under the influence of alcohol or drugs. The defendant himself testified that he had not been using drugs or alcohol at the time of the incident. The

jury recommended the death sentence. At the conclusion of the penalty phase, the following occurred:

"THE COURT: At this time, the jury having found James David Raulerson to be guilty of Murder in the First Degree, the jury having rendered its Advisory Sentence—eight recommending the death penalty and four recommending life in prison—the Court having found, pursuant to the jury verdict, the defendant guilty of the crime of Murder in the First Degree, and the Court having denied the Motion for New Trial and other Motions of the defendant, the Court does at this time adjudicate the defendant, James David Raulerson, to be guilty of the crime of Murder in the First Degree, Case No. 75–1325.

"Do you, or anyone on your behalf, have any legal cause to show why sentence should not be pronounced?

"MR. STEDEFORD: No legal cause at this time, Your Honor.

"THE COURT: Is there anything further in mitigation or aggravation?

"MR. STEDEFORD: Your Honor, I talked with Mr. Raulerson about the matter earlier. Anything he might say, we realize, of course, that you have the Presentence Investigation Report that you have provided to me. I have gone over it, I know that you have.

"THE COURT: Mr. Stedeford, I requested my secretary to give you two copies of that so Mr. Raulerson may have one also.

"MR. STEDEFORD: I have not given him his copy. I received a second copy earlier just a few moments ago, but I will give him one at the conclusion of this hearing.

"Your Honor, Mr. Raulerson and I did discuss what mitigation we might bring before the Court. We, frankly, feel as though it would do little good to talk of mitigation in this case, and we feel as though you have considered it, and that Mr. Raulerson and I both concur that anything we might say would not change what you might be doing today.

"At this time, Your Honor, there's nothing further to say in mitigation."

[8] Defendant now says there was a violation of the principles announced in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in that the defendant himself was not shown the presentence investigation report.

The record clearly shows that defense counsel was provided with a copy of the presentence report and that he discussed the matter of mitigation with the defendant prior to the time the judge imposed the sentence. The presentence report was made a part of the record and defendant has not referred to any portion which he desires to rebut or explain.

Gardner contemplates that the presentence report be furnished to defense counsel, as stated by the court:

"There is no dispute about the fact that the presentence investigation report contained a confidential portion which was not disclosed to *defense counsel*. At 1202.

* * * * * *

"Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*. In this particular case, the only explanation for the lack of disclosure is the failure of *defense counsel* to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

"Nor do we regard *this omission by counsel* as an effective waiver of the constitutional error in the record. There are five reasons for this conclusion. First, the State does not urge that the objection has been waived. Second, the Florida Supreme Court has held that it has a duty to consider 'the total record,' *Swan v. State*, 322 So.2d 485, 489 (1975), when it reviews a death sentence. Third, since two members of that court expressly con-

sidered this point on the appeal in this case, we presume that the entire court passed on the question. Cf. *Boykin v. Alabama*, 395 U.S. 238, 240–242, 89 S.Ct. 1709, 1710–1712, 23 L.Ed.2d 274 and n. 3. Fourth, there is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that *counsel could possibly have made a tactical decision not to examine the full report*, cf. *Estelle v. Williams*, 425 U.S. 501, 507–508, 96 S.Ct. 1691, 1694–1695, 48 L.Ed.2d 126. Fifth, since the judge found, in disagreement with the jury, that the evidence did not establish any mitigating circumstance, and since the presentence report was the only item considered by the judge but not by the jury, the full review of the factual basis for the judge's rejection of the advisory verdict is plainly required. For if the jury, rather than the judge, correctly assessed the petitioner's veracity, the death sentence rests on an erroneous factual predicate." (Emphasis supplied.) 97 S.Ct. at 1206–07.

The record clearly shows that the trial court complied with the *Gardner* standards.

Thereupon, the defendant was sentenced to death. The following findings in mitigation and aggravation were made by the court:

"MITIGATION

"(a) Whether the defendant has no significant history of prior criminal activity.

"*Finding*:

As a juvenile, or a young adult, Raulerson received at least one sentence to the State Institution at Alto, Georgia for larceny in the State of Georgia, occurring in 1967. On March 12, 1975, Raulerson robbed the Warehouse Grocery, Hokes Bluff, Alabama. In committing the robbery, he followed the same procedure that he followed in the present case in that he used a .38 caliber revolver, a similar mask, and required everyone to lie on the floor, face down. Raulerson was positively identified by James Pritchett, the husband of the head cashier of the Warehouse Grocery, as the man who pointed a .38 caliber revolver at him on the night of the robbery. After the Jacksonville Sheriff's Office arrested Raulerson, they found approximately $11,000.00 in his Corvette automobile parked at the Ramada Inn at Jacksonville Beach. The money has been traced to the money taken in a robbery on March 12, 1975, of the Warehouse Grocery, Hokes Bluff, Alabama, and the money taken from a robbery committed on April 26, 1975, at the Brown Derby Restaurant, Tallahassee, Florida. The State of Alabama has extradition proceedings in progress to return Raulerson to Alabama to be tried for armed robbery.

"(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"*Finding*:

Raulerson knew and was able to understand the nature, quality, and wrongfulness of his acts on April 27, 1975; was able to understand the charges facing him; was able to adequately assist counsel in his defense at the trial. Raulerson has an antisocial or passive/aggressive personality with a dichotomy in personality (a Jekyll-Hyde personality with the catalyst which triggers the Mr. Hyde manifestation being alcohol, drugs, or a verbally or physically perceived threat). Raulerson denies using drugs or alcohol in excess. There was no evidence of extreme mental or emotional disturbance during the commission of the crime.

"(c) Whether the victims were participants in the defendant's conduct or consented to the act(s).

"*Finding*:

The victims at no time and in no way consented nor participated in the conduct of the defendant's acts.

"(d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

"*Finding*:

Raulerson was not a mere accomplice but was the active and aggressive perpetrator of the robbery, the rape, and the murder.

"(e) Whether the defendant acted under extreme duress or under the substantial domination of another person.

"*Finding*:

The defendant was the dominant person in the robbery, rape, and murder and in all surrounding events. There was absolutely no evidence of any form of duress or domination.

"(f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.

"*Finding*:

Raulerson fully appreciated the criminality of his conduct and was capable of conforming his conduct to the requirements of law [refer to mitigation finding (b)].

"(g) The age of the defendant at the time of the crime.

"*Finding*:

Raulerson was in his majority, twenty-five years of age, at the time of the crime.

"AGGRAVATION

"(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

"*Finding*:

Raulerson was not under sentence of imprisonment when he committed the murder of which he has been convicted.

"(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

"*Finding*:

There was no evidence of a previous conviction involving the use of threat of violence.

"(c) Whether, in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

"*Finding*:

Raulerson, by the use of a firearm, by his directions to the people in the Sailmaker restaurant, and by all of his aforementioned actions created a great risk of death to many persons.

"(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery or rape.

"*Finding*:

The murder was committed immediately after Raulerson committed the crimes of robbery and rape and in an attempt to flee after committing the robbery and rape.

"(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"*Finding*:

The murder was committed by Raulerson in an attempt to escape from the Sailmaker restaurant and/or to avoid lawful arrest.

"(f) Whether the murder of which the defendant has just been convicted was committed for pecuniary gain.

"*Finding*:

The murder was committed during the commission of an armed robbery which Raulerson committed for pecuniary gain.

"(g) Whether the murder of which the defendant has just been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"*Finding*:

The person killed by Raulerson was a police officer of the Jacksonville Sheriff's Office performing his lawful duty in the enforcement of the laws of the State of Florida, and the protection of the people of the State.

"(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

"*Finding*:

The murder of Officer Stewart, the wounding of Officer English, the robbery of the manager of the Sailmaker restaurant, and the rape of Linda Harrison were cold, calculated crimes which were atrocious, heinous, and cruel.

"It is the finding of this Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances which exist to justify the sentence of death."

[9, 10] It is our responsibility to review the judgment and sentence imposed upon defendant in the light of other decisions and determine whether or not the punishment is too great. The sentencing process must be a matter of reasoned judgment rather than an exercise in discretion.

Alford v. State, 307 So.2d 433 (Fla.1975), was an affirmance of a death sentence where it appeared that the premeditated murder was committed by the defendant after committing rape. The Court found that the act was especially heinous, atrocious and cruel and the only mitigating circumstance was that defendant had no significant prior criminal record. Defendant in the present case says that the homicide was not heinous or cruel because it was accomplished by a pistol shot causing immediate death. This crime was committed during the course of the robbery and immediately after a rape. There were many shots fired and the deceased was well aware that his life was in danger from the moment he entered the restaurant. This was not a sudden attack, but was a part of a general robbery scheme. Alford had no significant prior criminal record. Raulerson had a significant history of prior criminal activity.

In *Sawyer v. State*, 313 So.2d 680 (Fla. 1975), the death penalty was justified by aggravating circumstance, which included the facts of an armed robbery resulting in murder, the defendant's prior record including the commission of multiple robberies. Sawyer was a hard drug user requiring the expenditure of $200 per day, and was a man with an uncontrollable violent temper. Just as in *Sawyer*, the defendant in the case *sub judice* had engaged in a series of robberies. Although it does not appear that Raulerson needed funds for the purchase of drugs or alcohol, it does appear that he was seeking pecuniary gain and that he committed a rape prior to the murder.

Songer v. State, 322 So.2d 481 (Fla.1975), involved the murder of a state trooper. The defendant who was sentenced to death was 23 years of age, had prior felony convictions, and was not so intoxicated at the time of the crime as to be unaware as to what he was doing. The defendant murdered the state trooper by shooting him four times and attempted to flee. There were no mitigating circumstances and the death penalty was held to be appropriate. Raulerson's offense was committed during his effort to flee.

The defendant in *Henry v. State*, 328 So.2d 430 (Fla.1976), had a lengthy history of violence and demonstrated callous indifference to human life when he assaulted a police officer at the time of his arrest. The Court found that his acts were committed for pecuniary gain and for no other motive than perhaps to eliminate a witness. The death penalty was properly imposed. Raulerson's acts were committed for pecuniary gain and for the purpose of avoiding arrest.

We are not confronted with the situation in which the "trigger man" was sentenced to life and the accomplice improperly received the death sentence, *Slater v. State*, 316 So.2d 539 (Fla.1975), nor are we confronted with the situation where the jury gives an advisory verdict recommending mercy and the trial judge sentenced defendant to death. *Swan v. State*, 322 So.2d 485 (Fla.1975); *Tedder v. State*, 322 So.2d 908 (Fla.1975).

A murder committed during the course of a robbery, where the evidence shows defendant as being the trigger man, has been carefully considered by the Court in several cases. *Meeks v. State*, 339 So.2d 186 (Fla. 1976), involved an execution-type murder so that defendant could flee after the commission of the robbery. The death penalty was held appropriate even though defendant

was 21 and had no prior history of criminal conduct.

In *Sullivan v. State, supra*, the sentence of death was held appropriate where defendant and his accomplice abducted the manager of a restaurant, fully intending to murder the victim. The defendant was 25 years old, with no prior criminal record. The victim was shot several times in the back of the head.

In reviewing the aggravating and mitigating circumstances, the nature of the murder and the circumstances under which it was committed, we hold that the aggravating circumstances outweigh the mitigating circumstances and the penalty of death is the proper sentence.

We have reviewed the evidence and it does not appear that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause. Accordingly, the judgment and sentence of the circuit court is hereby affirmed.

It is so ordered.

OVERTON, C. J., and BOYD, ENGLAND, SUNDBERG and KARL, JJ., concur.

APPENDIX II

Remarks of Petitioner's Counsel, David J. Busch, in connection with his Motion to Withdraw on the issue of State's claim that he had mishandled Petitioner's defense as they appear in Case No. 59757. James David Raulerson v. State of Florida (Initial Brief of Appellant, pp. 28-30).

Appellant's counsel then moved to withdraw (when requested to make a rebuttal argument) by stating:

> MR. BUSCH: Well, Your Honor, as I was listening to Miss Snurkowski my mind keeps wandering back to the state's -- or rather the Court's offer to me to proffer any evidence, and this question of whether I've been derelict in delaying this motion.
>
> And, I wonder whether my refusal or my decision not to proffer evidence was really an act in my own interest, my own best interest, or an act in the best interest of my client.
>
> And, I find myself really on the horns of a dilemma.
>
> I would -- I feel bound by the Code of Professional Responsibility, Your Honor, to move to withdraw from this case, because I just think that this question is central to the State's presentation.
>
> And, I don't feel as though I can do justice to Mr. Raulerson's case if I continue to try and represent him on that question.
>
> * * *
>
> I've been practicing for eight years. That may not be a long time from the Court's viewpoint, but I have never had my professional character attacked as it's been attacked in these pleadings and in their response to my memorandum and my motion on point after point about what I should have done, about my having engaged in abuse of legal process by my vexing, harassing, delaying the lawful execution of this judgment. It's an affront to me.
>
> She's right. I have represented this man in every court thus far, but I have not, until last week, ever had a pleading like this filed in any case that I've ever handled in any court in this state. And, I've practiced in every level of State Courts, and I've practiced in every level of the Federal Court.
>
> And, I've never received a pleading from my opponent that in any way approached the kind of -- she refers to it earlier. I believe she says, 'totally frivolous and scurrilous.'

> Well, I'm sorry, Your Honor. But what I think they have filed here is totally frivolous and scurrilous. It's scurrilous because I'm the one that's being attacked.
>
> I'm sorry, but I feel very strongly about that. (R-303, 305-306).

The court denied counsel's motion to withdraw (R-241).

It is now apparent that the state's assertion that counsel "could have and should have" raised the certain issues on the direct appeal was indeed central to the State's case. The best evidence of that is the trial court's order denying appellant relief on the ground, inter alia, that certain unspecified issues,

> Could have and should have been raised at trial and/or direct appeal, and therefore [were] waived; . . . (R0241).

A finding has been made that the undersigned did not properly preserve certain issues on appeal. There was and is a conflict of interest between appellant and his counsel. This Court's denial on March 10, 1981 of counsel's request to withdraw should not preclude review of the trial court's judgment below.

D. R. 5-102 provides:

Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A.) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

(B.) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

APPENDIX III

In Case Nos. 59757 and 59680, James David Raulerson v. State of Florida, the following items:

1. Motion to Withdraw as Attorney of Record, and Attachment of Petitioner's 1983 action against his counsel;

2. Denial of Motion to Withdraw;

3. Order denying Motion to Discharge Counsel and to proceed Pro Se.

IN THE SUPREME COURT OF FLORIDA

JAMES DAVID RAULERSON, :

Appellant, :

vs. : CASE NOS. 59,757
59,680

State of Florida, :

Appellee. :

:

MOTION TO WITHDRAW AS ATTORNEY OF RECORD

COMES NOW the undersigned Assistant Public Defender, David J. Busch, requesting an order from this Court allowing him to withdraw as attorney of record in the above-styled appeals for the following reasons:

1. Pursuant to an order of this Court entered January 12, 1981, a hearing was held in the Duval County Circuit Court on February 6, 1981, to determine whether appellant would be allowed to proceed in pro se on his appeals to this Court.

2. The trial court entered an order on February 10, 1981, denying appellant's motion to represent himself. A transcript of the hearing was forwarded to this Court and will be referred to in this motion by use of the symbols "TR" followed by the appropriate page number.

3. The hearing began with appellant stating that he had filed a "1983" action against the undersigned in his capacity as an assistant public defender (TR-2). The undersigned has since obtained a certified copy of appellant's civil rights complaint filed in the United States District Court, Northern District of Florida. A certified copy of the complaint is attached hereto as Exhibit A. On December 11, 1980, United States Magistrate Crongeyer recommended

that the complaint be dismissed with prejudice for failure to state a claim cognizable under 42 U.S.C. 1983. A certified copy of the recommendation is attached hereto as Exhibit B. On December 29, 1980, the federal court adopted the above referenced recommendation and dismissed the complaint with prejudice, a certified copy of the order is attached hereto as Exhibit C.

4. The repeated attempts by appellant in the trial court and in this Court to have his counsel removed from his case, combined with a lawsuit brought against the undersigned in federal court, warrants the filing of this motion. But in addition to all of that, appellant's festering hostility toward his attorney was made apparent when, at the hearing held in Circuit Court on February 6th, appellant went so far as to state:

> I can't get a private attorney? I don't want any more state action in my case. I don't want Mr. Busch.
>
> Now, I could assault the man. I don't know what a person has to do to get another attorney. Because, I'm not satisfied with his representation, and my life is at stake.
>
> (Emphasis added.)

5. DR 2-110(c)(1)(d) of the Code of Professional Responsibility provides that a lawyer may request permission to withdraw if his client:

> By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

The zealous advocacy required by counsel under Cannon 7 of the Professional Code is more likely to be compromised when counsel is sued by his client and threatened. See DR 2-110 (c)(2), which provides:

> His continued employment is likely to result in a violation of a Disciplinary Rule.

WHEREFORE, the undersigned requests an order from this Court allowing him to withdraw as attorney on these appeals.

Respectfully submitted,

DAVID J. BUSCH
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion To Withdraw As Attorney Of Record has been furnished by hand-delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. James David Raulerson, #049108, Post Office Box 747, Starke, Florida 32091; and Hon. Ralph W. Nimmons, Jr., Room 204, Duval County Courthouse, Jacksonville, Florida 32202, on this 24th day of February, 1981.

DAVID J. BUSCH

NOV 2 1 1980

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CIVIL RIGHTS COMPLAINT

Case No. 75-1325 CF
TCA 80-1084

REN JAMES DAVID RAWLERSON
049108
(Enter above full name of plaintiff and prison number, if any.)

vs.

DAVID J. BUSCH ESQ

(Enter above full name of each defendant. The complaint cannot be filed unless the full name of each defendant appears. The name of all defendants MUST appear in the spaces above or in the blank area to the right of the spaces.)

INSTRUCTIONS FOR FILING COMPLAINT BY PRISONERS UNDER CIVIL RIGHTS ACT, 42 U.S.C. SECTION 1983. READ CAREFULLY.

This packet includes one complaint form and one forma pauperis petition. To start an action you must file an original and one copy of your complaint for each defendant you name. For example, if you name two defendants you must file the original and two copies of the complaint. All copies of the complaint must be identical to the original. YOU SHOULD RETAIN ONE COPY OF THE COMPLAINT FOR YOUR RECORDS.

The Clerk will not file your complaint unless it conforms to these instructions and to this form.

YOUR COMPLAINT MUST BE LEGIBLE (BLOCK PRINTED OR TYPED). USE ONLY THE FRONT SIDE OF EACH PAGE.

You are required to furnish, so that the United States Marshal can complete service, the correct name and current address of each person that you have named as a defendant. A PLAINTIFF IS REQUIRED TO SUPPLY THE UNITED STATES MARSHAL WITH SUFFICIENT INFORMATION TO ENABLE THE MARSHAL TO COMPLETE SERVICE ON ALL PERSONS NAMED AS DEFENDANTS.

Your complaint can be brought in this Court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are related to the same incident or issue.

In order for this complaint to be filed, it must be accompanied by the filing fee of $60.00. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants named.

If you are unable to pay the filing fee and service costs for this action, you may petition the Court to proceed in forma pauperis. One blank petition for this purpose is included in this packet. After filling in the petition, you must have it notarized by a notary or other officer authorized to administer an oath and have an authorized official or business manager sign the bottom portion.

IMPORTANT NOTICE

YOU MUST MAKE AND RETAIN ONE COPY OF YOUR COMPLAINT AND ALL PLEADINGS AND MOTIONS FILED WITH THE COURT. THE CLERK'S OFFICE DOES NOT HAVE THE FUNDS TO MAKE COPIES FOR YOU.

will note that you are required to give facts. THIS COMPLAINT NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to:

Clerk,
U.S. District Court
Middle District of Florida
P.O. Box 53558
Jacksonville, FL 32201

COMPLETE THE FOLLOWING QUESTIONS

I. PREVIOUS LAWSUITS

A. Have you begun other lawsuits in State or Federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

YES (X) NO ( )

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit:

Plaintiffs: SAME

Defendants: S.R. Johns

2. Court (if Federal court, name the district; if State court, name the county.)

N/A

3. Docket Number: N/A

4. Name the judge to whom case was assigned:

N/A

5. Disposition, for example: Was the case dismissed? Was it appealed? Is is still pending? N/A

6. Approximate date of filing lawsuit: N/A

7. Approximate date of disposition: N/A

II. PLACE OF PRESENT CONFINEMENT: Florida State Prison

A. Is there a prisoner grievance procedure in this institution?

YES (X) NO ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

YES ( ) NO (X) NOT RELATED

C. If your answer is YES:

1. What steps did you take? _____

2. What were the results? _____

RTIES:

(In Item A below, place your name in the first blank and place your address in the second blank.)

A. Name of Plaintiff: KEVIN JAMES DAVID RAULERSON

Address: P.O. Box 747, STARKE, FLA 32091

(In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions and places of employment of any additional defendants.)

B. Defendant: DAVID J. BUSCH

is employed as PUBLIC DEFENDER

at P.O. Box 671, TALLAHASSEE, Florida 32302

C. Additional defendants: _____

_____

_____

STATEMENT OF FACTS:

SUMMARIZE here as briefly as possible the FACTS of your case. Describe how each defendant was involved. Include the name of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, set forth each claim in a separate numbered paragraph.

I AM NOT AWARE of WHAT is going on in MY CASE And HAVE NO COMMUNICATION WITH MR BUSCH. His loyALTY SEEMS To BE MORE To STATE SINCE THEY EMPLOY HIM. I do NOT WANT MORE STATE ACTION IN MY CASE.

1. MR BUSCH Told ME HE THOUGHT I WAS guilty.
2. MR BUSCH REFUSED To discuss PREPARATION of defence or ACTION TAKEN IN MY BEHALF
3. MR BUSCH REFUSED To SEEK, ORALLY STATE, POINTS REGARD discovery leading To NEW TRIAL
4. MR BUSCH STATED MONEY would MAKE difference in defen offered
5. MR BUSCH SOUGHT WITHDRAWAL but REFUSED To Address TOTAL NON-WORKABLE RELATIONSHIP WE HAD REACHED
6. I NEVER SEE MR BUSCH Till I GET To COURT WHERE I AM PETITIONER And MR BUSCH is ATTORNEY but I, PETITIONER, die IN ELECTRIC CHAIR AT His failure.
7. I AM CITING MR BUSCH FOR INEFFICIENCY of COUNSEL
8. COURTS REFUSAL To ACKNOWLEDGE TOTAL NONWORKABLE RELATIONSHIP forces ME To go into INTIMATE, EMBARRASSING details SHARED THESE FIVE YEARS AS REQUESTED by MR BUSCH
9. MR BUSCH is INTERESTED in PRIVATE PRACTISE AT SAME Time HE is public defender THUS CREATING CONFLICT OF INTEREST
10. MR BUSCH ~~is interested~~ WISHES To CARRY MY CASE INTO PRIVATE PRACTISE THUS PROLONGING MY CONFINEMENT.
11. I do NOT WISH To BE forced by COURT To FURTHER VIOLATE ATTORNEY/CLIENT RELATIONSHIP VIOLATING MY CIVIL RIGHTS, AS WELL AS MR BUSCHS, To GAIN RELIEF FROM COURTS To EVENTUALLY BE SEEN AS EXPEDITING OR BURDENING COURT PROCESS PERHAPS FURTHER placing ME in JEOPARDY of DEATH
12. TOTAL NEGLIGENCE IN PROCESS of APPEAL AND VARIED POINTS THEREOF, TOTALLY DEPENDING ON GARDNER.
13. Late CITING of CASES THEREBY BURDENING COURT
14. I MADE WRITTEN MOTIONS To APPEAR PRO SE, AS MY ATTORNEY He did NOT ASK COURT To Address THIS
15. Exhibit (number one) attached if neglect PRESENT

V. RELIEF REQUESTED:

State briefly exactly what you want the Court to do for you. Make no legal arguments. Cite no cases or statutes.

I WANT MR BUSCH REMOVED FROM MY CASE TO GIVE ME OPPORTUNITY TO HAVE PRIVATE COUNCIL TO EXPEDITE THIS GRANT ME $16,000 TEN THOUSAND, DOLLARS A DAY DAMAGES AGAINST MR BUSCH FOR FORCING ME INTO THIS DAMAGING ISSUE AS LONG AS HE REMAINS ON MY CASE

Signed this 20 day of November, 1980.

Lee A Rauhauser
SIGNATURE OF PLAINTIFF

FORMA PAUPERIS AFFIDAVIT

I, Reu James David Rawlerson, being first duly sworn, depose and say that I lack funds sufficient to repay the filing for the prosecution fo this cause, and that I have not, for the purpose of avoiding payment of said cost, divested myself of any property, monies or things of value.

Reu J D Rawlerson
SIGNATURE OF PLAINTIFF

STATE OF FLORIDA)
COUNTY OF Bradford)

I, _____, being first sworn under oath, present that I have subscribed to the above and do state that the information contained therein is true and correct to the best of my knowledge and belief.

Reu J D Rawlerson
SIGNATURE OF PLAINTIFF

Sworn to and subscribed before me this 20 day of November, 1980.

Ricky K Mays
NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT. 15 1984

I HEREBY CERTIFY that the plaintiff herein has the sum of $ 62 11/6/80, on account to his credit at the Florida State Prison institution where he is confined.

Gloria Pilcher 11-13-80
AUTHORIZED OFFICER OR BUSINESS MANAGER

ASE COMPLETE IN FULL THE NAME AND ADDRESS OF EACH DEFENDANT.

DEFENDANT'S NAME: MR DAVID J. BUSCH

DEFENDANT'S ADDRESS: P.O. BOX 671, TALLAHASSEE FLORIDA 32302

ALL ADDITIONAL DEFENDANTS' NAMES AND ADDRESSES:

DO NOT WRITE BELOW THIS LINE

U. S. MARSHAL'S RETURN ON SERVICE

Executed this order by serving the within named _____

_____

by handing to and leaving with _____

a true copy of this order on _____.

GEORGE R. GROSSE
UNITED STATES MARSHAL

LOUIS C. CARRES
Chief Appellate Assistant

MICHAEL M. CORIN
Capital Appeals Coordinator

Assistant Public Defenders
DAVID J. BUSCH
NANCY A. DANIELS
JUDITH J. DOUCHERTY
MARGARET GOOD
JENNIE JEROME
THOMAS S. KEITH
JOSEPH LEWIS, JR.
HAROLD W. LONG, JR.
THEODORE E. MACK
CARL S. MCGINNES
RANDOLPH P. MURRELL
STEVEN H. PARTON
THOMAS L. POWELL
THOMAS PRESNELL, JR.
GENE S. TAYLOR
LYNN ALAN THOMPSON

OFFICE OF
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MICHAEL J. MINERVA
Public Defender

TALLAHASSEE OFFICE
Barnett Bank Bldg., Suite 480
Post Office Box 671
Tallahassee, Florida 32302
Phone 488-2458

QUINCY OFFICE
Gadsden County Courthouse Annex
Quincy, Florida 32351
Phone 627-9241

November 5, 1980

Rev. J.D. Raulerson
#049108, Cell 19-2102
Florida State Prison
Post Office Box 747
Starke, Florida 32091

Dear J.D.:

I am returning the forms which you forwarded to me for filing with the Circuit Court, Fourth Judicial Circuit. The Florida Supreme Court now has jurisdiction over your cases nos. 59,757 and 59,680. If you wish to have me relieved as attorney in this case, I suggest you file your in pro se motion in the Florida Supreme Court. The State of Florida is not going to consent to have me relieved as counsel of record in this case. It would be foolish for me to even attempt to get Carolyn Snurkowski to sign her name to the kind of consent form which you forwarded to me.

Please understand, J.D., that by returning these forms, I am not attempting to hinder your attempts at having me taken off your case. If you can convince the Florida Supreme Court that it should appoint another lawyer to represent you on these appeals, then more power to you! I am confident of my own abilities and I have no regrets about my handling of your case in the past. I think we understand each other.

If you do decide to file a motion in the Florida Supreme Court, I would appreciate your providing our office with a copy and I suggest that you also send a copy to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida.

Best wishes to you.

Sincerely,

David J. Bosch
Assistant Public Defender

DJB/we
Enclosure

STATE OF FLORIDA
Plaintiff

vs

JAMES DAVID RAULERSON
Defendant

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 75-1325 CF

MOTION TO DISCHARGE COUNSEL

Comes now, JAMES DAVID RAULERSON, Defendant, and moves the Court to relieve his attorney of record, David J. Busch, of further responsibility in this cause and as grounds for said Motion says:

That he does not believe said attorney will diligently prosecute Defendant's appeal in the above cause and that he further believes that it would be in his best interest for the Court to appoint other counsel to represent him in the prosecution of said appeal.

WHEREFORE, the Defendant, JAMES DAVID RAULERSON, HEREBY MOVES THE COURT to discharge said David J. Busch as his attorney of record and to appoint other counsel to represent him in the prosecution of this appeal.

Dated at Florida State Prison, this 30 day of October 1980

JAMES DAVID RAULERSON
James David Raulerson
Defendant

Bonnie Hannington
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT. 11, 1983

EXHIBIT A
PAGE 10 OF 12

C O N S E N T

The undersigned, David J. Busch, counsel of record for James David Raulerson, hereby consents to the entry of an order grant- the above and foregoing Motion.

DAVID J BUSCH

_____

Attorney for Defendant

The undersigned, Ralph N. Green III Assistant State Attorney for the Fourth Judicial Circuit, hereby consents to the entry of an Order granting the above and foregoing Motion.

RALPH N. GREENE III

_____

Assistant State Attorney

INSTITUTION FSP — CELL NUMBER 19-210

NAME Rev. JD Raulerson NUMBER 049108

JOB ASSIGNMENT _____ DATE _____

Dear Person,

Thank you for your kind consideration. I had mailed copy to Mr Busch before realizing my folly. I am sorry for trouble caused.

Sincerely,

Rev. JD Raulerson

CERTIFIED A TRUE COPY

MARVIN S. WAITS, CLERK

By Virgie Chasmar
Deputy Clerk

EXHIBIT A
PAGE 12 OF 12

RECORD COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

REV. JAMES DAVID RAULERSON,)

Plaintiff,)

vs.)

DAVID J. BUSCH,)

Defendant.)

ORDER, REPORT AND RECOMMENDATION

This cause is before the Court upon a civil rights complaint filed pursuant to Title 42, United States Code, Section 1983, and an application for leave to proceed in forma pauperis. It affirmatively appears that leave to so proceed should be granted.

The plaintiff has alleged that he was not adequately represented by the defendant, an Assistant Public Defender, on criminal charges in the Circuit Court in and for Leon County, Florida. The plaintiff seeks damages in the amount of $10,000.00 per day and removal of the defendant from his case.

The issue of whether a public defender is immune from a Section 1983 damage claim for acts done in the performance of his judicial function as a public defender was discussed exhaustively by the Fifth Circuit Court of Appeals in the recent case of Robinson v. Bergstrom, 579 F.2d 401 (5th Cir. 1978). That case noted that it was already the law of three other federal circuits that 1983 actions could not be

maintained against Public Defenders because of their absolute immunity. Cf. Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Minns v. Paul, 542 F.2d 899 (4th Cir. 1976); Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972), cert. denied, 412 U.S. 950, 93 S.Ct. 3015, 37 L.Ed.2d 1003.

The Fifth Circuit also noted that the Seventh and Tenth Circuit Courts of Appeal have taken the position that a public defender, in representing an indigent, serves much like a private counsel and not "under color of state law" so that a federal court must dismiss such actions because they do not fall within the provisions of Section 1983. John v. Hurt, 489 F.2d 786 (7th Cir. 1973); Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). Furthermore, a number of federal district courts have also ruled that a public defender does not act "under color of state law". Clark v. Brandom, 415 F.Supp. 883 (W.D.Mo. 1976); Berryman v. Shuster, 405 F.Supp. 1346 (W.D.Okla. 1975); Sanchez v. Murphy, 385 F.Supp. 1362 (D.Nev. 1974); Hill v. Lewis, 361 F.Supp. 813 (E.D. Ark. 1973); U.S. ex rel Wood v. Blacker, 335 F.Supp. 43 (D.N.J. 1971).

Obviously, this court would lack jurisdiction entirely if it were held that the public defender does not act "under color of state law." But assuming that a public defender does act "under color of state law" and the court does have jurisdiction, as noted above it has been held often before that a public defender is entitled to absolute immunity, just as is a state judge or prosecutor. Indeed, the ultimate holding of the Fifth Circuit in Robinson, supra, was that a

federal public defender has "absolute immunity from suit or a Section 1983 claim'.

Beyond that, the Court of Appeals has flatly held that 42 U.S.C. 1983 was never intended as a vehicle for prosecuting malpractice cases against court-appointed attorneys. United States ex rel Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976); Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974); O'Brien v. Colbath, 465 F.2d 358 (5th Cir. 1972).

In O'Brien, supra, the Fifth Circuit Court established the principle that an action for damages against court-appointed counsel in a state prosecution alleging improper representation is no more than a tort claim for malpractice and does not state a claim cognizable under 42 U.S.C. 1983. Accordingly, it is

ORDERED:

Leave to proceed in forma pauperis should be, and the same is hereby, granted.

It is further RECOMMENDED:

The plaintiff's civil rights complaint should be dismissed with prejudice for failure to state a claim cognizable under 42 U.S.C. 1983.

IN CHAMBERS at Pensacola, Florida, this 11th day of December, 1980.

ROBERT L. CROMGEYER, JR.
United States Magistrate

MARVIN S. WALL, CLERK

By Deputy Clerk

EXHIBIT B
PAGE 3 OF 3

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

REV. JAMES DAVID RAULERSON,)
Plaintiff,)
) TCA 80-1084
vs.)
DAVID J. BUSCH,)
Defendant.)

ORDER

This cause having come on for consideration upon the magistrate's report and recommendation dated December 11, 1980, and the court having considered the report and recommendation and determined that the same should be adopted, it is

ORDERED:

1. The magistrate's report and recommendation is adopted and incorporated by reference in this order of the court.

2. The clerk is directed to prepare, sign and enter a judgment in accordance with Rule 58(1),F.R.Civ.P., that the plaintiff take nothing, and that this action be dismissed with prejudice.

DONE AND ORDERED this 29th day of December, 1980.

UNITED STATES DISTRICT JUDGE

CERTIFIED A TRUE COPY
MARVIN S. WALLS, Clerk
By: Bridget Channing

1980 DEC 23 PM 4:23

EXHIBIT C
PAGE 1 OF 1

5(B)

IN THE SUPREME COURT OF FLORIDA

TUESDAY, MARCH 10, 1981

JAMES DAVID RAULERSON

Appellant,

v.

CASE NO. 59,757
59,680

STATE OF FLORIDA

Appellee.

* * * * * * * * * * * * * *

Upon consideration of David J. Busch's motion to withdraw as attorney of record in the above styled, the motion is denied.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM
C: David J. Busch, Esquire
Carolyn Snurkowski, Esquire
James David Raulerson
Hon. Ralph W. Nimmons, Jr.

253 6A

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO. 75-1325 CF
DIVISION T

STATE OF FLORIDA

-vs-

JAMES DAVID RAULERSON

ORDER DENYING MOTION TO
DISCHARGE COUNSEL AND
TO PROCEED PRO SE

On January 12, 1981, the Florida Supreme Court entered an order temporarily relinquishing jurisdiction to this Court for a hearing on the Defendant's request to discharge counsel and to proceed pro se on his appeals pending before the Florida Supreme Court in Case Nos. 59,630 and 59,757.

A hearing was held before this Court on February 6, 1981 at which the Court heard from the Defendant who was present before the Court. Also present was Defendant's counsel, David Busch, Esquire, Assistant Public Defender of the 2nd Judicial Circuit. A copy of the transcript of said hearing is attached hereto. The Court finds that the Defendant's purported waiver of his right to be represented by counsel on the pending appeals has not been intelligently and knowingly waived. The Court further finds that, based upon the Court's efforts to communicate with the Defendant at said hearing, and the Defendant's nonresponsive statements and demeanor, the Defendant is either incapable or unwilling to understand or abide by even the most fundamental of legal procedures, and is wholly incompetent to represent himself on the pending appeals. For the reasons hereinabove set forth and as stated by the Court at the conclusion of the hearing, it is

ORDERED AND ADJUDGED that the Defendant's above referred motion is denied.

DONE AND ORDERED at Jacksonville, Duval County, Florida, on this

10th day of February, 1981.

ORIGINAL SIGNED:
RALPH W. NIMMONS, JR.

CIRCUIT JUDGE

Copies To:

Hon. Sid J. White, Clerk of
Florida Supreme Court
Ralph N. Greene, III, Esq.
Carolyn Snurkowski, Esq.
David J. Busch, Esq.
James David Raulerson

APPENDIX IV

Time table re: Death Sentence and Description of Sentencing Hearing as they appear in case no. 59680, James David Raulerson, Appellant v. State of Florida, Appellee, (Initial Brief of Appellant, April 24, 1981) and filed by David J. Busch, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida, on behalf the appellant.

Time table

In order to fully appreciate the haste with which the sentencing court acted in sentencing appellant to death, the following dates are set forth for this Court's consideration:

1.	Governor signs death warrant	4-18-80
2.	Minerva'a letter to Mr. Chief Justice England	5-2-80
3.	Florida Supreme Court order allowing Public Defender, 2nd Jud. Cir., to represent appellant.	5-7-80
4.	Federal District Court grants habeas corpus relief	5-9-80
5.	State indicates in Circuit Court that it will appeal that decision	5-14-80
6.	Federal District Court denies rehearing	6-24-80
7.	Sentencing set for July 15, 1980	7-7-80
8.	Motion for Continuance filed	7-9-80
9.	Order re-scheduling hearing for July 21, 1980	7-11-80
10.	Order re-scheduling hearing for August 11, 1980	7-21-80
11.	Resentencing hearing held	8-11-80
12.	Appellant sentenced to death	8-12-80

Only about six weeks passed between the date the federal court order vacating appellant's death sentence became final until appellant was resentenced to death. Only about a month passed between the time defense counsel received notice of the resentencing and the reimposition of the death sentence (R-42).

It is most important to note that the undersigned did not represent appellant at trial. The record in Case No. 59, 757, reflects that counsel requested an appointment to represent appellant at the Rule 3.850 proceedings only because at the time the motion was filed, the Governor had signed a death warrant. The undersigned had not interviewed any witnesses or otherwise investigated facts in preparation for an evidentiary hearing (TR-8). Many of the witnesses were from out of state. The hearing was in Jacksonville. Defense counsel were in

Tallahassee (R-58-59). Appellant's motions for an updated pre-sentence investigation and for funds to hire an investigator (R-66-69) were denied (R-78,79). Notwithstanding all of these considerations, the sentencing court was of the opinion that there had been "substantial delays already", referring to the six week period between Judge Castagna's order and the date of sentencing (TR-15,17). Appellant was not allowed to proffer evidence in support of his motion (TR-15). The sentencing court was so determined to conclude the entire hearing in one day, August 11, 1980, that it refused to allow one of appellant's witnesses to appear and testify on the morning of August 12, 1980 (TR-72-74). Other out-of-state witnesses, whose existence and importance came to light on the day of the hearing, could not be brought forward because of the sentencing court's insistence that the hearing be wrapped up in a single day (TR-240-242). If appellant had had additional time, those witnesses and the expert psychiatric examinations which expert witness Farr opined necessary (TR-231), could have been presented. Pages 30-31

Description of Sentencing Hearing

The record does not reflect when the sentencing hearing began. It was scheduled to begin at 9:00 a.m. (R-47). It must have begun sometime after 10:00 a.m. because defense counsel interviewed witnesses during the morning prior to that time (TR-71). The record does reflect when the hearing ended. It was almost 8:00 p.m. when the court denied counsel's request that he be allowed a night's rest before presenting summary argument (TR-262,266). There was a lunch recess taken for about one and 1/2 hours. Defense counsel used that time to converse with out-of-state witnesses whom he had never met before (TR-9, 71). The record also reflects 266 pages of transcribed trial proceedings on August 11, 1980. After ruling, "That will conclude the presentation of evidence and

arguments by counsel", the court recessed until 11:30 a.m. the following morning (TR-266).

Why the rush? Why should the hearing have ended in the middle of the night, following a proposed recess for dinner and then closing argument by defense counsel? (TR-262) The record does not provide answers to those questions.

There can be no doubt that defense counsel were exhausted by the day long proceedings, unless one chooses to believe that they were deliberately making false representations to the court (TR-260-261). Page 34

APPENDIX V

The Ineffective Assistance of Counsel portion of Petitioner's Motion for Post-Conviction Relief as it appears in the record of Case No. 59680, State of Florida, Respondent v. James David Raulerson, Petitioner.

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,
Respondent,
vs.
JAMES DAVID RAULERSON,
Petitioner.

CRIMINAL DIVISION
CASE NO. 75-1325-CF

MOTION FOR POST-CONVICTION RELIEF

X

Petitioner was denied a fair trial and effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 9, 16 and 22, of the Florida Constitution because his trial attorney, among other things:

(a) Failed to move for a change of venue despite the continuing high level of public awareness and outrage at the killing of the police officer.

(b) Failed to object to the prosecutor's comment in opening statement that the petitioner would testify.

(c) Failed to object when the trial court did not admonish the jury to avoid viewing the scene of the offense.

(d) Failed to object to the prosecutor's inflamatory characterization of petitioner as an "animal" during closing argument at the guilty phase of trial.

(e) Failed to object to the trial court's underlying felony murder instruction on the offense of rape, which criminal offense had been repealed and stricken from the laws of Florida six months prior to the commission of the crime for which the petitioner was indicted.

(f) Failed to object to the court's omission to instruct the jury that the element of specific intent was essential to prove robbery.

(g) Failed to object to the prosecutor's improper, inflamatory and prejudicial remarks made during closing argument at the penalty phase as set forth in VI above.

(h) Failed to object when the trial court caused the penalty phase to be unjustly skewed in favor of death by permitting the state to have both opening and closing arguments.

(i) Failed to consult in a timely manner with petitioner regarding the contents of the presentence investigation report and to accord petitioner his rights to review, rebut and explain its contents prior to sentencing.

(j) Failed to object to a misleading argument by the prosecutor concerning the applicability of certain aggravating factors which were separately urged upon the jury although said factors may not properly under the law be considered separately in aggravation.

(k) Failed to object to the state's introduction of evidence at the penalty phase of a prior criminal offense for which petitioner had not been convicted. Said evidence was irrelevant to statutory aggravation.

(l) Failed to present a proper closing argument during the penalty phase by:

(1) Not challenging the state's argument which improperly construed aggravating and mitigating circumstances,

(2) Not presenting available theories to rebut alleged aggravating circumstances and to support mitigating circumstances,

(3) Not making affirmative arguments in petitioner's behalf but instead acknowledging complete and abject ineffectiveness in representing petitioner on the penalty issue.

(m) Failed to become knowledgeable of the law pertaining to the trial of a capital case so as to be able to protect the rights of petitioner.

(n) Failed to adequately prepare for trial in that he did not among other things, determine if Lynda Harrison had been examined for evidence of recent forcible sexual intercourse.

(o) Failed to provide petitioner with reasonably effective assistance of counsel in both the guilt and penalty phases through the cumulative effect of the errors alleged in this point.

82-6110 IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DAVID RAULERSON

PETITIONER

V

STATE OF FLORIDA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

CONSOLIDATED CASES NOS: 59,680 & 59,757
FEBRUARY TERM 1983

PETITIONER FILES AS CO-COUNSEL WITH REPRESENTATION FROM HEREBY AUTHORIZED JOSEPH F. KEESE OF 179 WATER STREET, TORRINGTON, CT, APPEARING ON MY BEHALF TO SIGN MY PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT TO REVIEW THE MOST RECENT DECISION IN RAULERSON V FLORIDA RENDERED IN THE FLORIDA SUPREME COURT.

Supplement regarding request for relief on ineffect
ive assistance of counsel at trial before Judge Susan
Black, while represented by Walter R. Stedeford Esquire
33 South Hogan St., Suite 4A, Jacksonville, Florida 32202. I did
not retain him. I was amnesic in state of mental duress. I had
recollection and reasoning ability but no factual memory to relate
to MR Stedeford but he did not pursue in a defensive manner
in use of my amnesia nor provide evidence for those called
to give expert testimony. See Exhibit "A."

Page 490 of trial transcripts: Milton Bernard Mann, Doctor
of Medicine specializing in psychiatry called on behalf of the defendant
page 493 line 21: Q Did you feel as though it was loss of memory on
Mr Ramsdell's part? A. I don't know. Since he raised the question, and stated
he had been quite ill with a gunshot wound, I speculated, I really wasn't trying
to give the impression that I was making a diagnosis, I speculated that
if he had a serious [redacted] injury that had him unconscious for
a period of time, it could be possible, but I certainly had no information
to back that up. On page 19 of transcript of record Dr Milton Bernard
Mann states in letter to the court: Conceivably, if he were critically ill while
at University Hospital, it is possible that he could be amnesic because of
the severe illness, but this would be something that developed at approximately
the time of his arrest or shortly there after, and his loss of memory prior
to this would be what is called retrograde amnesia.

Transcript page 487 line 15-489 line 2: Dr Fred Brindle surgical resident at Univer-
sity Hospital on duty night of April 27th 28, 1975. When asked if he could characterize my facial
appearance; A. Well he had contusions of both cheek bones, well bruises large bruises
and abrasions, and both eyes were swollen [redacted] and he had some areas in the fore
head that were swollen. Abrasions something that glances across the skin and
removes the superficial layers of epithelia sort of a broad scrape and a
contusion is a blow to the soft tissue that results in swelling from hema-
oma, blood loss. He had them on both cheeks with abrasions, scraping away
the outer layers of skin. And one hand was swollen. It was my opinion on
day I saw him following surgery that he was disoriented and in a state
of delirium. ....

I surrender to police unmarked except for bullet wound. Where did
injuries come from and by whom? These are violations of constitutional and
civil rights. See "Citations" of constitutional, civil rights, & criminal law.

11 - 15 - 82

Exhibit A

To whom it may concern

On April 27th 1975 My son James D. Ranierson was arrested at the Sailmaker Restaurant in Jacksonville Florida and admitted to the University Hospital in Jacksonville. On the 29th of April we visited him at the hospital for 5 minutes and found he had been shot and brutaly beaten of course he was unconisous and appeared to be having convulsions and distant reabeje we were there His eyes were black he had a small gash on the left side of his face and he had a bad wound on his head plus one of his hands were crushed. He still has the scars after 7 years

Sincerly yours

Mrs Clara L. Hamlin
Nelson & Hamlin St.

Notary Public
My Comm Exp. 8-8

WASHINGTON V.S. STRICKLAND : Citations: No. 81-5379

—INEFFECTIVE COUNSEL—

1. CRIMINAL LAW ⊂ 641.13(1) Vital corollary to 6th Amendment guarantee of right of assistance of counsel is requirement of effective assistance of council that is counsel reasonably likely to render and rendering effective assistance given totality of circumstances

—AMNESIA—

U.S. vs FRATUS 530 F2d 644 CERTIORARI denied 97 S. Ct. 130, 129 U.S. 846, 50 L. Ed 2d 118: Test for mental competency to stand trial is whether defendant has sufficient present ability to consult with his attorney with reasonable degree of rational understanding and whether he has rational as well as factual understanding of proceedings against him. 18 U.S.C.A. § 4244

U.S.-vs-VARNER 467 F2d 659 : BLAKE-vs-U.S. 407 F2d 908

U.S.-vs-SWANSON 572 F2d 523, CERTIORARI denied 99 S. Ct. 152, 439 U.S. 849 58 L. Ed. 2d 152

U.S.-vs-GEIER, 521 F.2d 597

U.S.-vs-HAYES, 589 F2d 811, REHEARING denied 591 F.2d 1343, CERTIORARI denied 100 S.Ct. 93, 444 U.S. 847, 62 L. Ed 2d 60

United S.C.A. Const. Amends 5, 6.

Wilson-vs-U.S. 391 F.2d 460, 129 U.S. App. D.C. 107

—BEATING—

18 U.S.C.A. § 242 U.S.C.A. Const. Amend 14, U.S.-vs-STOKES 506 F2d 771

CREWS-vs-U.S. 160 F2d 746 CR. Code § 20, 18 U.S.C.A. § 52

U.S.-vs-TRIERWEILER, 52 F. Supp 4.

.....

ELEMENTS of offense under statute prohibiting violation of civil Rights under color of state law are that the action was taken under color of state law, that the action was taken to willfully deprive rights protected by the Constitution and laws of the United States, and that the action was taken against an inhabitant of any state of the United States, 18 U.S.C.A § 242 U.S.-vs-FLEMING, 399 F. Supp 77, REVERSED 526 F2d 191 CERTIORARI [redacted] dismissed 96 S.Ct. 872, 423 U.S. 1082, 47 L.Ed 2d 93